EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 84-6263-CSY
Status: GRANTED

Title: James Kirkland Batson, Petitioner
v.
Kentucky

Docketed:
February 19, 1985

Court: Supreme Court of Kentucky

Counsel for petitioner: Niehaus, James David

Counsel for respondent: Miller Jr., Carl T., Pearson, Rickie L.

Entry	Date	Note	Proceedings and Orders
1	Feb 19 1985	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Mar 21 1985		Brief of respondent Kentucky in opposition filed.
4	Mar 21 1985		DISTRIBUTED. April 12, 1985
6	Apr 15 1985		RELISTED. April 19, 1985
8	Apr 22 1985		Petition GRANTED.
10	May 13 1985		Order extending time to file brief of petitioner on the merits until June 28, 1985.
11	Jun 4 1985		Record filed.
12	Jun 4 1985		Certified original record, 7 volumes, received.
13	Jun 17 1985		Joint appendix filed.
14	Jun 25 1985		Brief amicus curiae of Michael McCray, et al. filed.
15	Jun 26 1985		Brief amicus curiae of NAACP Legal Defense and Educational Fund, et al. filed.
16	Jun 28 1985		Brief amicus curiae of National Legal Aid and Defender Assn. filed.
17	Jun 28 1985		Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed.
18	Jun 28 1985		Brief amicus curiae of Elizabeth Holtzman, District Attorney, Kings Cnty, NY filed.
19	Jun 27 1985		Brief of petitioner James K. Batson filed.
20	Jul 25 1985		Brief amicus curiae of National District Attorneys Assn. filed.
22	Jul 22 1985		Order extending time to file brief of respondent on the merits until August 17, 1985.
23	Aug 16 1985		Brief amicus curiae of United States filed.
24	Aug 17 1985		Brief of respondent Kentucky filed.
25	Jul 11 1985	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
26	Oct 7 1985		Motion of the Acting Solicitor General for leave to participate in GRANTED.
27	Oct 18 1985		CIRCULATED.
28	Oct 22 1985		SET FOR ARGUMENT, Wednesday, December 11, 1985. (4th case).
29	Oct 22 1985	G	Motion of Elizabeth Holtzman, District Attorney for Kings County, New York, for leave to participate in oral argument as amicus curiae, for divided argument and additional time filed.
30	Oct 23 1985	X	Reply brief of petitioner James K. Batson filed.
31	Nov 4 1985		Motion of Elizabeth Holtzman, District Attorney for

2 copies

No. 84-6263-CSY

Entry	Date	Note	Proceedings and Orders
			Kings County, CALIF.
32	Dec 9 1985		SCHEDULED FOR ARGUMENT, Thursday, December 12, 1985 (4th case).
33	Dec 12 1985		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

RECEIVED
FEB 19 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 84 6263 Misc., October Term, 1984

JAMES KIRKLAND BATSON,

Petitioner,

V.

COMMONWEALTH OF KENTUCKY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

FRANK W. HEFT, JR.
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
719 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 587-3800
COUNSEL FOR PETITIONER

DANIEL T. GOYETTE
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

CERTIFICATE

I hereby certify that a copy of the Petition was served by depositing the same in a United States mailbox, with first-class postage prepaid, to Mr. Paul Reilander, Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent, on February 15, 1985.

FRANK W. HEFT, JR.
COUNSEL FOR PETITIONER

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

The petitioner, James Kirkland Batson, prays that a Writ of Certiorari be issued to review the decision of the Supreme Court of Kentucky in his case.

QUESTION PRESENTED

IN A CRIMINAL CASE, DOES A STATE TRIAL COURT ERR WHEN, OVER THE OBJECTION OF A BLACK DEFENDANT, IT SWEARS AN ALL WHITE JURY CONSTITUTED ONLY AFTER THE PROSECUTOR HAD EXERCISED FOUR OF HIS SIX PEREMPTORY CHALLENGES TO STRIKE ALL OF THE BLACK VENIREMEN FROM THE PANEL IN VIOLATION OF CONSTITUTIONAL PROVISIONS GUARANTEEING THE DEFENDANT AN IMPARTIAL JURY AND A JURY COMPOSED OF PERSONS REPRESENTING A FAIR CROSS SECTION OF THE COMMUNITY?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2-3
REASONS FOR GRANTING REVIEW	4-8
APPENDIX	

TABLE OF AUTHORITIES

	Page
James Kirkland Batson v. Commonwealth of Kentucky, No. 84-SC-733-MR	1
Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979)	5,6
Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 690 (1965)	3
McCray v. Abrams, ____ F.2d ____ (2 Cir. 1984) 36 CrL. 2197 (12-19-84)	5,7
McCray v. New York, ____ U.S. ____, 103 S.Ct. 2438, 2442, 77 L.Ed.2d 1337 (1983)	4,5,6,7,8
People v. Wheeler, 148 Cal.Rptr. 890, 583 P.2d 748 (1978)	5,6
Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)	3,4,5,6,7,8
Taylor v. Louisiana, 419 U.S. 522, 530, 95 S.Ct. 692, 698, 42 L.Ed.2d 690 (1975)	4
United States v. Thompson, 730 F.2d 82 (8 Cir. 1984)	7,8
United States v. Whitfield, 716 F.2d 145 (4 Cir. 1983)	7
CONSTITUTIONAL PROVISIONS - UNITED STATES	
Sixth Amendment	1,3,4,7,8
Thirteenth Amendment	4
Fourteenth Amendment	1,4
Fifteenth Amendment	4
CONSTITIONAL PROVISIONS - KENTUCKY	
Section 11, Kentucky Constitution	3
STATUTES	
KRS 511.030	1
KRS 514.110	1
MISCELLANEOUS	
28 U.S.C. §1257(3)	1
42 U.S.C.S. §1971, et. seq., P.L. 97-205, June 29, 1982	5
Sup.Ct.R. 20.1	1
Kentucky Rules of Criminal Procedure:	
RCr 9.36(2)(3)	2
RCr 9.40(1)(2)	2
RCr 12.02	3
Voting Rights Act of 1965	4

OPINIONS BELOW

No written opinion was rendered by the Jefferson County, Kentucky Circuit Court. Following a jury trial, Petitioner was convicted of Second Degree Burglary [Ky.Rev.Stat. (KRS) 511.030] and Receiving Stolen Property with a value greater than $100.00 (KRS 514.110) on February 14, 1984. (TR, 211). On March 20, 1984, the Jefferson Circuit Court entered final judgment, sentencing Petitioner to twenty (20) years imprisonment. (TR, 222; Appendix, App., p. 1).

By Opinion rendered December 20, 1984, the Supreme Court of Kentucky affirmed Petitioner's conviction. The case was styled, James Kirkland Batson v. Commonwealth of Kentucky, No. 84-SC-733-MR. The Opinion was issued as one "not be be published."

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1257(3). The Supreme Court of Kentucky affirmed Petitioner's conviction in an unpublished Opinion rendered December 20, 1984. This Petition is, therefore, timely filed pursuant to Sup.Ct.R. 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

SIXTH AMENDMENT

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed***

FOURTEENTH AMENDMENT, Section One

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

James Kirkland Batson was charged with Second Degree Burglary and Receipt of Stolen Property with a value greater than $100.00 as a result of an incident in which Mrs. Henrietta Spencer said that she saw him in her house stealing two purses that belonged to her. (TE, 18-20; 47-48; 157-159). The receiving stolen property charge resulted from the testimony of a pawn broker who said that Batson and another pawned to him a wristwatch and some rings taken from Mrs. Spencer. (TE, 139-140; 136-138).

On the day of trial,[1] a jury panel was presented for examination and, in accordance with Kentucky practice, each party was allowed to exercise peremptory challenges. [Kentucky Rules of Criminal Procedure (RCr) 9.36(2)(3)]. (TE, 5). Under the rules of court in Kentucky, the prosecutor was allowed five peremptory charges and one extra peremptory due to the calling of extra jurors for examination. [RCr 9.40(1)(2)]. Mr. Gutmann, the prosecutor, used his peremptory strikes in the following manner:

> Yeah, during this particular -- yeah, I struck four blacks and two whites. (TE, 7-8).

He also admitted that his peremptory strikes left an "all-white jury." (TE, 8). The significance of Gutmann's actions was that

> ...There were four black jurors on the case. (TE, 6).

The trial attorney for Petitioner, Doug Dowell, advised the trial judge that

> After I reviewed my notes, I noted that all four of them were struck by the Commonwealth's peremptories. (TE, 6).

On this basis, Dowell moved the court to discharge the panel (TE, 6), and, later, objected to the swearing of the panel as the jury in the case. (TE, 8). As grounds, Dowell argued that Petitioner would be denied an impartial trial by a cross-section of the community and would be denied equal protection of the law. The provisions of the Sixth and Fourteenth Amendments were relied on in this argument. (TE, 6; 8). Both the objection to the swearing of the panel and the motion

---

1. For the convenience of the Court, the pertinent parts of the trial record and the Petitioner's brief on appeal are set out in the Appendix.

to discharge were overruled. (TE, 8). The jury was then sworn for service on Batson's case. (TE, 9).

On the basis of the evidence referred to at the beginning of this statement of facts, the jury returned verdicts of guilt on the charges of burglary and receipt of stolen property. (TR, 222; App., 7). The punishment for these offenses was enhanced pursuant to Kentucky's Persistent Felon law to a total term of twenty (20) years imprisonment. (TR, 222; App. 7).

A timely appeal was taken as a matter of right to the Supreme Court of Kentucky. (TR, 232). [RCr 12.02]. In the briefs filed by James Batson in that court, he argued that the prosecutor's action deprived Batson of the right to trial by an impartial jury guaranteed by the Sixth Amendment of the United States Constitution and Section Eleven of the Constitution of Kentucky. (App., 10). The argument presented by the Petitioner noted a distinction between the rule introduced in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), for equal protection analysis and the requirements of the Sixth Amendment of the United States Constitution which was made applicable to the states in Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 690 (1965). (App., 10). On the particular facts of this case, Petitioner also argued that his right to equal protection of the law and due process of law was denied. (App. 13). Petitioner asked the Supreme Court of Kentucky to vacate the judgment and to remand to the trial court for hearing on the reasons for the peremptory challenges by the prosecutor (App. 13).

In an unpublished Opinion rendered on December 20, 1984, the Supreme Court of Kentucky rejected Petitioner's argument holding that it had recently "reaffirmed our reliance upon Swain" and that because Batson had not shown "systematic exclusion from the jury drum" his claim was not cognizable under Swain, "and we decline to adopt another rule." (App., 5). The judgment of the circuit court was affirmed. (App., 6).

REASON FOR ISSUANCE OF THE WRIT

This case presents the important question of whether the Constitution allows a prosecutor to use peremptory challenges in jury selection solely on the basis of the prospective juror's race. The matter of improper use of peremptory challenges by a prosecutor is an issue that involves the Sixth Amendment of the United States Constitution because such challenges can result in a jury that does not represent the community and which may, therefore, prevent a trial before a fair and impartial jury. In Taylor v. Louisiana, 419 U.S. 522, 530, 95 S.Ct. 692, 698, 42 L.Ed.2d 690 (1975), the Court accepted as a necessary component of a fair trial a jury made up of a fair cross section of the community. Such a jury is required as a prophylaxis against arbitrary exercise of authority. [Taylor v. Louisiana, 419 U.S. at 530, 95 S.Ct. at 698]. Acknowledgment of this fundamental requirement has called into question the rule concerning peremptory challenges set out in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). In that case, the Court held that the equal protection clause of the Fourteenth Amendment does not afford a criminal defendant the right to question the prosecutor's use of peremptory challenges in any one case. [380 U.S. at 222, 85 S.Ct. at 837]. A presumption of rectitude was assigned to the prosecutor which could be rebutted only by a showing that the prosecutor over a period of years struck all blacks from jury panels. [380 U.S. at 223; 85 S.Ct. at 837]. In recent years, this rule has come under increasingly strident attack. The gist of these attacks has been

> There is no point in taking elaborate steps to ensure that Negroes are included on venires simply so they can be struck because of their race by a prosecutor's use of peremptory challenges. [Dissent from denial of certiorari, McCray v. New York, _____ U.S. _____, 103 S.Ct. 2438, 2442, 77 L.Ed.2d 1332 (1983)].

The history of the United States gives ample support to the conclusion that minorities, blacks in particular, are subject to treatment based on racial stereotypes rather than individual characteristics and merit. The Thirteenth, Fourteenth, and Fifteenth Amendments of the United States Constitution bear witness to the existence of racial discrimination. The recent renewal of the Voting Rights Act of 1965 is further

evidence of continued unequal treatment of blacks. [June 29, 1982, P.L. 97-205, 42 U.S.C.S. §1971 et. seq.]. It is, therefore, not surprising that the exclusion of blacks from juries by means of peremptory challenges exercised by representatives of the state creates the suspicion that racial stereotypes rather than individual unsuitability for jury service on a particular case are the motives for the challenges. It is necessary to have some reasonable means to probe the motives of the prosecutor. The means provided by Swain is not sufficient to the task. The requirement of showing a long term systematic exclusion of blacks is an insuperable obstacle to redress of constitutional rights. [McCray v. New York, dissent from denial of certiorari, 103 S.Ct. at 2440]. Without a determined effort by the defense bar, which tends to be composed of sole practitioners and small firms, the record keeping required to show the required "pattern of conduct" in any one area likely cannot be done. In any event, the requirement of Swain is an excessive burden in light of the relief that customarily will be sought in cases where the prosecutor's challenges are questioned. The common point of the recent cases that depart from the Swain rule is that the prosecutor will have to explain his actions only where he has struck all the members of a cognizable group and there is a likelihood that the members are being challenged only because they are members of the group. [People v. Wheeler, 148 Cal.Rptr. 890, 583 P.2d 748 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979); McCray v. Abrams, _____F.2d_____ (2 Cir. 1984), 36 Cr L. 2197 (12-19-84)]. Even if the prosecutor is called to account, he has only to provide some non-racial motivation for his peremptory challenges to avoid discharge of the jury or the grant of a new trial. The right to an impartial jury made up of a fair cross section of the community is of sufficient importance to require adoption of a new rule to protect the right. The Court has impliedly recognized the need.

In 1983 the Court voted to deny certiorari in a group of cases collected under the name of McCray v. New York, _____U.S._____, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983). Two justices dissented, arguing that the petition should be granted for reasons similar to those

presented in this Petition. [103 S.Ct. at 2439]. Three other justices agreed that the discriminatory use of peremptory challenges merited consideration but preferred to allow other Courts to consider the question in order to "enable us to deal with the issue more wisely at a later date." [103 S.Ct. at 2438]. The absence of conflicting decisions within the federal system was also noted. [103 S.Ct. at 2438]. This group of justices took as a hopeful sign the adoption of new principles to deal with improper peremptory challenges in People v. Wheeler and Commonwealth v. Soares (both cited above) in 1978 and 1979. However, the Court's invitation to other courts has gone largely unaccepted. A review of cases decided since 1978 when People v. Wheeler was issued, shows that twenty-five states have considered the Swain rule and its alternatives. (A table of these cases is found in the Appendix at page 19. The cases are compiled under the headings that follow).

Of the twenty-five cases decided, fourteen (14) have reaffirmed adherence to Swain either by direct citation or by requiring evidence of long standing and systematic exclusion to justify relief. Of the fourteen states that have followed Swain, seven (7) did so in opinions rendered in 1983 ane 1984. The remaining seven (7) chose the Swain rule in cases decided in 1981 and 1982. Indiana, Louisiana, and New York reiterated their already established allegiance to Swain. Four states would not or could not decide the issue in the case that was presented. Two states decided cases on the ground that a defendant has no right to a particular jury. One jurisdiction, the District of Columbia, ruled that Wheeler and Soares were decided on state constitutional grounds and that, therefore, the federal constitution was not raised by the question of improper challenges.

Since 1978-1979 when Wheeler and Soares were decided, only New Mexico and Florida have established new rules. New Mexico solved the problem by saying that its courts would consider arguments made pursuant to Swain or Wheeler-Soares. Florida adopted a new rule similar to Wheeler-Soares in 1984.

There is nothing in the review of cases above to encourage the belief that the states are willing to do their part as "laboratories

in which the issue receives further study before it is addressed by this Court." [McCray v. New York, 103 S.Ct. at 2439]. The laconic and curt opinion of the Supreme Court of Kentucky in the present case is typical of the treatment that this issue has received in the jurisdictions that continue to follow Swain. These courts show no real interest in reconsidering Swain. Therefore, this Court should now decide this question. If the Court does not decide this issue, it is quite likely that the issue will not be decided.

A second reason for review is the conflict of opinion recently created in the federal court system. On December 4, 1985, the United States Court of Appeals for the Second Circuit rendered an Opinion styled McCray v. Abrams, _____F.2d_____ (1984), 36 Cr.L. 2197-98, (December 19, 1984), which held that Swain continued to control cases presented on equal protection principles, but that another approach based on the Sixth Amendment to the United States Constitution was possible. That court held that discriminatory use of peremptory challenges by the prosecutor violated the right to trial by a jury composed of a fair cross section of the community. A two-part showing by the defendant was devised by which the defendant is required to show that the group that is challenged is "cognizable" and that there is a "substantial likelihood" that the challenge was based on group affiliation. If such a showing is made, then the prosecutor must show that his strikes were "racially neutral." Unless the prosecutor satisfies the trial court that permissible reasons motivated his peremptory challenges, the picked jury must be discharged and a new jury selected from a different panel.

It may readily be seen by referring to the recent cases of United States v. Thompson, 730 F.2d 82 (8 Cir. 1984) and United States v. Whitfield, 715 F.2d 145 (4 Cir. 1983), that McCray v. Abrams creates a conflict of authority in the federal courts. The Court should act to resolve this conflict.

Another important reason for review of this case is that state court decisions are in obvious conflict with a large number of states holding to the equal protection analysis of Swain v. Alabama, cited above, while some few states have changed to a principle of fair

representation on a jury pursuant to the Sixth Amendment of the United States Constitution. (See Appendix, p. 19). Those states retaining the Swain rule have decided the issue of discriminatory use of peremptory challenges in a way that this Court implies is not the way it will settle the question when the question is accepted for review. [McCray v. New York, _____U.S._____, 103 S.Ct. 2438-2439; 77 L.Ed.2d 1322 (1983); Thompson v. United States, _____U.S. _____, 105 S.Ct. 443 (1984)]. This matter should be settled by this Court which is the one judicial body capable of making an authoritative disposition of the issue.

This case would make an excellent vehicle by which to settle the question of improper use of peremptory challenges. All blacks were removed from the jury because of the prosecutor's peremptory challenges. A discrete group was removed from the jury which raises the suspicion that the strikes were made for reasons of group association rather than the individual's lack of fitness to serve on the jury. For the reasons shown in this Petition, the Court is urged to grant the writ prayed for.

Frank W. Heft, Jr.
FRANK W. HEFT, JR.
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
719 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 587-3800
COUNSEL FOR PETITIONER

Daniel T. Goyette
DANIEL T. GOYETTE
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

RECEIVED

A.M. JAN 25 1985 P.M.

PAULIE MILLER
CIRCUIT CLERK
JEFFERSON COUNTY

Supreme Court of Kentucky

NO. 84-SC-733-MR

JAMES KIRKLAND BATSON — APPELLANT

FINAL

DATE JAN 10 1985

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEORGE RYAN, JUDGE
NO. 82-CR-0011

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, James Kirkland Batson, was convicted by a jury in the Jefferson Circuit Court of second-degree burglary and receiving stolen property over $100.00. Punishment was raised to 20 years for both counts after the establishment of second-degree persistent felony offender status.

Appellant was convicted of burglarizing the home of Mrs. Henrietta Spencer and her husband in September of 1981. Mrs. Spencer testified that while she was sitting in her living room with her husband, she felt a draft, heard a noise, and then saw a young black man stooping in their front doorway and taking purses which were hanging on a doorknob in the next room.

[illegible] ladies' rings. Mrs. Spencer later identified the appellant as the man she saw by the[illegible] neighbor, Regina Cornellius, stated to police that on the day of the burglary she saw appellant Batson standing between her house and the Spencers', and later saw him running away from the back of the Spencers' house. Appellant produced a witness at trial, Lee Weese, an investigator for the public defender, who testified that Mrs. Cornellius gave him a statement some six months later that appellant Batson appeared to be standing guard and that there was another person whom she did not know standing at the front of the Spencers' house with a chair.

Appellant's conviction for receipt of stolen property arose from an incident where appellant Batson and co-indictee Larry Macklin appeared together at a pawn shop where Batson pawned a Caravelle watch and Macklin pawned two ladies' rings. The two rings were later identified by Mrs. Spencer as belonging to her. Batson was charged with having acted alone or in complicity with Macklin on this charge, but Macklin is not a party to this appeal.

Appellant charges the trial court with four errors in his appeal. First of all, appellant argues that the evidence at trial did not exclusively support the felony charge of receiving stolen property in an amount over $100, and therefore the trial judge erred in refusing appellant's tendered instructions on the misdemeanor charge of receipt of stolen property under $100.00.

a trial court is duty bound to give instructions applicable to every state of the case deducible or supported by the testimony, including instructions on lesser-included offenses where there could be reasonable doubt as to the greater offense. Kelly v. Commonwealth, Ky., 267 S.W.2d 536 (1954), and Luttrell v. Commonwealth, Ky., 554 S.W.2d 78 (1977). The evidence at trial concerning value consisted of testimony by Mrs. Spencer that one of the rings had a fair-market value of $110.00, and the testimony of the pawnbroker that the replacement value of the two rings was in excess of $100.00 although he allowed only $15.00 for each ring. The record shows that it was his practice to give only a small percentage of an item's full value in pawn. Thus, the evidence of the pawn value of the rings is irrelevant to an accurate determination of their fair-market value. There was no evidence from which it could reasonably be inferred that the fair-market value of the rings was less than $100.00.

Appellant's second assertion of error is that he was denied a fair trial due to the trial court's refusal to provide his counsel with a transcript of a previous trial on the same charge which ended in a mistrial. Appellant relies on Britt v. North Carolina, 404 U.S. 226, 92 S. Ct. 431, 30 L. Ed.2d 400 (1971), which stands for the proposition that a state must provide an indigent defendant with the transcript of a prior trial if needed for an effective defense. Appellant asserts that his need for a transcript can be seen by the inherent value of a transcript of prior proceedings as a discovery device or impeachment tool, and by a situation which occurred at trial

wherein a transcript was actually issued. Appellant points to a situation where a Commonwealth's witness testified inconsistently with his testimony at the previous trial. Later, during the appellant's case-in-chief, appellant's counsel sought to have the court reporter read notes of the prior testimony, but was refused by the trial court. A later avowal of the testimony clearly showed the inconsistency. However, the record shows the trial court's refusal to allow the court reporter's notes to be read was simply that any impeachment of the witness should have occurred while he was on the stand during cross-examination, and not by the introduction of evidence during the defense's case-in-chief. The trial court showed no disposition to restrict appellant's access to the court reporter's notes.

Britt specifically holds that where adequate alternatives exist, a trial court need not provide an indigent defendant with a transcript of prior proceedings. Since the same counsel represented the appellant during both trials, and the trial court showed no inclination to restrict appellant's use of the court reporter's notes, we hold the appellant was not denied a fair trial due to the refusal to supply him with a free transcript.

Appellant next contends that it was error to permit the prosecuting attorney to exercise preemptory challenges to all of the blacks who were called as jurors in this case. Appellant acknowledged that the United States Supreme Court in Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965),

rule that preempt[illegible] challenges against [illegible] themselves, do not violate the Fourteenth Amendment equal-protection clause. However, appellant urges this court to adopt the position of other states based upon the Sixth Amendment and their own state constitutions, that preemptory challenges against minority groups can be unconstitutional if they were shown to be a pattern of challenges against jurors from a discrete group and a likelihood that the challenges were based solely on group membership. People v. Wheeler, 583 P.2d 748 (Cal. 1978), and Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979). We have recently reaffirmed our reliance upon Swain in Commonwealth v. McFerron, Ky., ____ S.W.2d ____ (1984), holding that an allegation of the lack of a fair cross-section jury which does not concern a systematic exclusion from the jury drum does not rise to constitutional proportions, and we decline to adopt another rule.

Appellant finally contends the trial court erred in refusing to admit testimony of a witness concerning the physical description of Larry Macklin. He sought to offer this testimony to show that Larry Macklin fitted the description of the perpetrator of the crime and that the identification of appellant by Mrs. Spencer may have been mistaken. By avowal the witness, Detective Robert Rutledge, stated that the arrest sheet showed that Larry Macklin was a black male weighing 170 pounds and was twenty-nine years old.

Larry Macklin was a codefendant with appellant but was tried separately. One witness testified that an unidentified person was seen fleeing the Spencer premises. Mrs. Spencer

as the only one before trial [illegible] identified appellant as that person. Evidence of any striking similarity between Macklin and appellant would be admissible as to the credibility of the identification by Mrs. Spencer, but the testimony offered was of such a general nature that it could have little, if any, effect upon the credibility of Mrs. Spencer. Further, the proffered testimony was properly excluded as hearsay. We conclude the exclusion of the testimony was not error.

The Judgment is affirmed.

All concur.

ATTORNEY FOR APPELLANT:

J. David Niehaus
Office of the Jefferson
District Public Defender
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202

ATTORNEYS FOR APPELLEE:

David L. Armstrong
Attorney General
Paul Reilender, Jr.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

AOC-79-450

Commonwealth of Kentucky
Court of Justice

KRS Cr. 532; RCr 11.02, 11.04

JUDGMENT AND SENTENCE ON PLEA OF NOT GUILTY (Jury Trial)

Case No. 82CF-0010

County JEFFERSON

Court DIV. 10 - CIRCUIT

COMMONWEALTH OF KENTUCKY

v.

JAMES KIRKLAND BATSON

The defendant at arraignment having entered a plea of not guilty to the following charges included within the i
dictment(s): (1) BURGLARY II (2) R.S.P. O/$100 (3) P.F.O. II
and having on the 14th day of February 19 84 appeared in open court with his attorne
Honorable Douglas Dowell
the case was tried before a jury which returned the following verdict: (BURG. II) 5 YEARS
(R.S.P. O/$100) 1 Year - (P.F.O. II) ENHANCES BURG. II TO 15 YEARS AND R.S.P. O/$100
TO 5 YEARS.

On the 20th d f March 19 84 the defendant appeared in open cou
☐ without counsel ☒ with his attorney Doug Dowell and the court inquired of the defendant an
his counsel whether they had a legal cause to show why judgment should not be pronounced, and afforded the defe
dant and his counsel the opportunity to make statements in the defendant's behalf and to present any information i
mitigation of punishment, and the court having informed the defendant and his counsel of the factual contents an
conclusions contained in the written report of the presentence investigation prepared by the Division of Probation an
Parole, the Defendant ☒ agreed with the factual contents of said report ☐ was granted a hearing to controvert th
factual contents of the report. Having given due consideration to the written report of the Division of Probation an
Parole, and to the nature and circumstances of the crime, and to the history, character and condition of the defendan
the court is of the opinion:

with a few changes.

☒ That imprisonment is necessary for the protection of the public because

_____ A. there is a substantial risk that defendant will commit another crime during any period of pr
bation or conditional discharge.

_____ B. the defendant is in the need of correctional treatment that can be provided most effectively b
the defendant's commitment to a correctional institution.

_____ C. probation or conditional discharge would unduly depreciate the seriousness of th
defendant's crime due to:

(Continued on back)

123

(4)

☐ That the defendant is not eligible for probation or conditional discharge because of the applicability of KRS 532.080 or KRS 533.060.

☐ That the defendant is eligible for probation or conditional discharge as hereinafter ordered.

No sufficient cause having been shown why judgment should not be pronounced, it is ADJUDGED BY THE COURT that the defendant is GUILTY of the following charge(s):

(1) BURGLARY II (2) RECEIVING STOLEN PROPERTY OVER $100.00 (3) PERSISTENT FELONY OFFENDER

and is sentenced to: (BURG. II) P.F.O. II ENHANCES TO 15 YEARS. (R.S.P. O/$100) P.F.O. II ENHANCES TO 5 YEARS. TO RUN CONSEC. WITH EACH OTHER & CONSEC. WITH INDICT. #82CR130

☐ fine of $ _____ to be paid _____

☐ probation as stated in the attached Order of Probation.

☐ conditional discharge as stated in the attached Order of Conditional Discharge.

☒ imprisonment for a maximum term of 20 YEARS in PENITENTIARY (institution) to run ☐ concurrently ☒ consecutively with a previous sentence imposed in #82CR1305.

It is further ORDERED that the sheriff of JEFFERSON County deliver the defendant to the custody of the Department of Corrections at such location within this Commonwealth as the Department shall designate.

It is further ORDERED that the defendant is hereby credited with time spent in custody prior to sentence, namely 19 days as certified by the jailer of Jefferson County towards service of the maximum term of imprisonment (or toward payment of a fine at the rate of $5 per day).

After imposing sentence, the court informed the defendant that he has a right to appeal with the assistance of counsel; that if he is financially unable to afford an appeal, a record will be prepared for him at public expense and counsel will be appointed to represent him; that an appeal must be taken within 10 days of the date of this judgment, and that the clerk of the court will prepare and file a notice of appeal for him within that time if he so requests. Pending appeal, the defendant is ☒ remanded to custody ☐ released on bail in the amount of $ None

It is further ORDERED that the Court Costs of this action be and hereby are waived.

(Continued on page 3)

...ment of the above charge...

☐ If there are no findings of guilt shown above, the charges are ...ssed, dismissed and the defendant is discharg...

March 20, 1984 — Judge

Judgement entered and notice of entry served on the defendant by mailing a true copy to defendant's counse... record. Doug Dowell

postage prepaid, on March 21, 19 84

PAULIE MILLER, Cl...

by DORIS FOSBERG, D...

NOTE TO CLERK: If defendant is sentenced to death or confinement, give two certified copies of this judgme... to the sheriff who delivers him to the institution. RCr 11.22.

ENTERED IN COURT

MAR 20 1984

PAULIE MILLER, Clerk

By ... Dep.

SHERIFF'S RETURN

COPIES TO:
DEPT. ATTY. - DOUG DOWELL
2 COPIES TO CRIMINAL CLERK'S OFFICE
1 COPY TO PROBATION & PAROLE

III. THE COMMONWEALTH'S ATTORNEY'S ACTION BY PEREMPTORILY CHALLENGING ALL THE BLACK JURORS IN THE PRESENT CASE DEPRIVED THE APPELLANT OF HIS RIGHT TO AN IMPARTIAL JURY BY DUE PROCESS OF LAW.

In the case at bar, the prosecutor used his peremptory challenges to strike off of the jury all four (4) black jurors. The appellant, who is black, was tried by an all white jury. These facts were stipulated by the prosecutor before the swearing of the jury panel (TE, 6-8). The appellant moved that the jury panel not be sworn for this reason (TE, 6). The court overruled the motion (TE, 8

The Sixth Amendment to the United States Constitution, as well as Section 11 of the Kentucky Constitution, guarantees to each criminal defendant the right to a jury drawn from a fair cross section of the community. [Taylor v. Louisiana, 412 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975)]. The deliberate exclusion of blacks from the jury deprives a defendant of a fair cross section of the community [Id. 479 U.S. at 528, 95 S.Ct. at 696].

Appellant concedes that Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), rejects the notion that the use of peremptory challenges against blacks, by itself, necessarily violates equal protection. However, the decision in Swain was based entirely upon the ground of equal protection of the laws, and not, as here, the Sixth Amendment. The Sixth Amendment, in this context, was made applicable to the states after the decision in Swain [Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 690 (1975)].

Since the decision in Swain, the United States Supreme Court has not examined this issue in light of the Sixth Amendment. However, the denial of certiorari in McCray v. New York, _____ U.S. _____,

103 S.Ct. 2438 (1983), indicates a probability that five (5) members of the court would prefer a differing rule under the Sixth Amendment. Justices Marshall and Brennan directly called for a new rule [103 S.Ct. at 2439-2443]. Justices Stevens, Blackmun and Powell did not disagree with the assessment made by Justice Marshall (103 S.Ct. at 2438), but preferred that "the various states...serve as laboratories in which the issue receives further study before it is addressed by this Court." [103 S.Ct. at 2439].

Two state Supreme Courts have done so. In People v. Wheeler, 148 Cal.Rptr. 890, 583 P.2d 748 (1978), the California Supreme Court held that when a prosecutor peremptorily challenges all black jurors because of a "group bias", the right to a jury drawn from a fair cross section of the community is severely compromised. The Court in Wheeler recognized that while a litigant is not actually entitled to a jury that proportionately represents the community, the litigant is still "entitled to a petit jury that is as near an approximation of the ideal cross section of the community as the practice of random draw permits." [Id. 583 P.2d at 762]. It is when the deliberate actions of the state, through its agent, seek to artifically remove elements necessary to the cross section of the community that the Sixth Amendment is invoked.

In Commonwealth v. Soares, Mass., 387 N.E.2d 499 (1979), the Supreme Judicial Court of Massachusetts followed the case of People v. Wheeler, above [Soares, 387 N.E.2d at 516]. The Court acknowledged that there is a rebuttable presumption of the proper use of peremptory challenges, but added:

> that presumption is rebuttable, however, by either party on a showing that (1) a pattern of conduct has developed whereby several prospective jurors who have been challenged peremptorily are members of a discrete group, and (2) there is a likelihood they are being excluded from the jury solely by reason of their group membership.
> [Id. 387 N.E.2d at 517].

The Court will note that the rule is similar to the rule under equal protection in Swain. However, the rule under the Sixth Amendment does not require a showing of 'systematic exclusion' over the course of several trials. It was this feature of the Swain - Equal Protection test which has made Swain the "subject of almost universal and often scathing criticism."[1] [McCray, supra, 103 S.Ct. at 2440 (Marshall, J., dissenting)].

The evidence presented by stipulation in the present case obviously meets the above test. The prosecutor had used his peremptory challenges to remove one hundred (100) percent of the black jurors. In Soares the Court found that the exercise of the challenge against twelve (12) of thirteen (13) blacks clearly demonstrated a "pattern of conduct." As to the second ground, the court found that since ninety-two (92) percent of the blacks had been struck, it indicated a "likelihood that blacks were being challenged because they were black." [Id. 387 N.E.2d at 517]. The percentage of blacks struck in the case at bar was one hundred (100) percent. Obviously, this gives rise to at least a "likelihood" of improper purpose. Soares also holds that the race of the defendant can be taken into consideratio In Soares, as in the present case, the defendant is a member of the "discrete group" being struck.

---

1. The Swain test would have the perverse result of reversing the conviction of the tenth defendant because he could establish "systematic exclusion" in the nine previous cases, yet afford no relief to the previous nine defendants.

The test having been met, the prosecutor must assume a burden to explain away the use of the peremptory challenges. "[T]he burden shifts to the allegedly offending party to demonstrate, if possible, that the group members of disproportionately excluded were not struck on account of their group affiliation." [Id. 387 N.E.2d at 517].

In the case at bar, the prosecutor made no attempt to justify his use of the peremptory challenges even after being presented with the accusation that he was using the challenges for an invalid purpose and having stipulated that he had struck one hundred (100) percent of the prospective black jurors (TE, 6-8). As is demonstrated above, the prosecutor had the burden to show, if he could, that the peremptories were not done for an invalid purpose. When a litigant has a burden to show a fact, or to reasonably deny an accusation, and does not do so, it can be presumed that he is unable to do so. [Cessna v. Commonwealth, Ky., 465 S.W.2d 283, 285 (1971)]. Thus, a clear inference arises that the use of the peremptories in the case at bar were intended to accomplish an invalid purpose. Even under the discredited Swain test, this would establish a violation of the equal protection of the laws and due process of law [Swain, 380 U.S. at 223, 85 S.Ct. at 837].

Therefore, the Court is urged to vacate the judgment and remand to the trial court for hearing on the reasons of the prosecutor for the use of his peremptory strikes.

(At this point, the jury panel was seated in the courtroom in alphabetical order, voir dire examination was conducted but was specifically excluded from request for transcript per the Designation of Proceedings; strikes made by respective counsel, extra jurors excused and exited the courtroom, and the jury was seated in the jury box as follows:)

THE CLERK: As I call your name, the sheriff will conduct you to your seat in the jury box.

Juror Number One, Ruth Ran; Juror Number Two, Elsie Dupin; Juror Number Three, Richard Carroll; Juror Number Four, Dena Meece; Juror Number Five, Samuel Dabney; Juror Number Six, Lucia Vibert; Juror Number Seven, Carolyn Bunger; Juror Number Eight, Joseph Gaines; Juror Number Nine, Patrick Yarber; Juror Number Ten, Dona Estes; Juror Number Eleven, Joyce Smith; Juror Number Twelve, Arthur Dickerson; Juror Number Thirteen, Anthony Ferg.

THE CLERK: All right. Would you please stand and raise --

MR. DOWELL: Your Honor, may we approach the bench for a minute, please?

(WHEREUPON, counsel for the Commonwealth and the Defendant approached the bench where a conference was held in whispered tones, out of the hearing of the jury, as follows:)

MR. DOWELL: Your Honor, prior to the swearing of the jury, I would like to make a motion to discharge the panel on the following grounds.

There were four -- I would like the Record to reflect -- and, also, I would like it if we could have a hearing on this outside the hearing of the jury; I would like to request that -- but there were four black jurors on the case. After I reviewed my notes, I noted that all four of them were struck by the Commonwealth's pre-emptories. The jury now, as empanelled, I want the Record to reflect, is an all-white panel.

I submit that under these circumstances, the defendant is being denied his right to an impartial trial, a cross-section of the community, under the Sixth and Fourteenth Amendment. He's also being denied equal protection of the law under the U.S. Constitution. And he's also being denied a fair, impartial trial.

THE COURT: You want to have a hearing on this, don't you?

MR. DOWELL: Yes, Your Honor.

THE COURT: All right. I will pick up in just a minute.

MR. DOWELL: I would object to the swearing of the jury at this time.

THE COURT: I'm going to overrule because it has to be a cross-section of the whole, entire panel and that selection process.

Anybody can strike anybody they want to.

MR. DOWELL: Does the Court agree -- essentially, the facts I'd want to establish at a hearing are, number one, that there were four black jurors in the panel and that the Commonwealth exercised its pre-emptories as to those, all four black jurors.

THE COURT: Well, they can do it if they want to.

MR. DOWELL: Do you accept that as true? Is that accurate, Mr. Gutmann?

MR. GUTMANN: Yeah, during this particular -- yeah, I struck four blacks and

two whites.

MR. DOWELL: Okay. And that this left an all-white jury. Is that right?

MR. GUTMANN: In looking at them, yes; it's an all-white jury.

MR. DOWELL: Okay. I would assert that that violates the constitutional provisions, so I just asserted in absence of any, you know, compelling justification that that denies the defendant of equal protection of law, denies him his right to a fair cross-section and a fair and impartial jury.

THE COURT: You're talking about the cross-section selection process of the panel itself, if that happened. Out of Frankfort where they draw them by computer, you might have a point, but this is different.

MR. DOWELL: Okay. So my motion, my objection to the swearing of this jury is overruled?

THE COURT: Yes.

MR. DOWELL: And also my motion to set aside is overruled?

THE COURT: That's right.

MR. DOWELL: Okay. Thank you, Your Honor.

MR. GUTMANN: Thank you.

(End of conference at bench.)

* * *

THE COURT: All right. Swear the jury.

THE CLERK: Will you stand and raise your right hand, please.

(WHEREUPON, the jury having been duly sworn by the Clerk of the court, proceedings continued as follows:)

THE COURT: Now, all the jurors that have not been selected for one reason or another, I appreciate your being over here. We always have to have a panel large enough to select the twelve or thirteen that try the case.

Thank you very much. You can go back to the Jury Pool and maybe you can pick up another case in there.

(At this point, the "extra" jurors were excused and exited the courtroom.)

THE COURT: I'm going to call for a fifteen-minute break here now. You all have been sitting

CASES CITED SINCE 1978

A. FOLLOWING SWAIN V. ALABAMA

1. Mitchell v. State, Ala.Cr.App., 450 So.2d 181 (1984)
2. Blackwell v. State, Ga., 281 S.E.2d 684 (1981)
3. People v. Payne, 75 Ill. Dec. 643, 457 N.E.2d 1202 (1983)
4. Swope v. State, 263 Ind. 476, 325 N.E.2d 193 (1975)

   Hoskins v. State, Ind., 441 N.Ed.2d 419 (1982)
5. Commonwealth v. McFerron, Ky., _____S.W.2d_____ (1984), (Mandate Issued 32 Kentucky Law Summary 1, p. 20, January 18, 1985)
6. State v. James, La.Cr.App., 459 So.2d 1299 (1984)

   State v. Brown, La., 371 So.2d 751 (1979)
7. Lawrence v. State, Md.App., 444 A.2d 478 (1982)
8. State v. Hurley, Mo.App., 680 S.W.2d 209 (1984)
9. People v. McCray, 457 N.Y.S.2d 441, 443 N.E.2d 915 (1982)

   People v. Charles, 61 N.Y.2d 321, 473 N.Y.S.2d 941 (1984)
10. State v. Shelton, N.C.App., 281 S.E.2d 684 (1981)
11. Lee v. State, Okl.Cr., 637 P.2d 879 (1981)
12. State v. Raymond, R.I., 446 A.2d 743 (1982)
13. State v. Thompson, S.C., 281 S.E.2d 216 (1981)
14. State v. Wooden, Tenn.Cr.App., 658 S.W.2d 553 (1983)

B. NO DETERMINATION MADE

15. Mallott v. State, Alas., 608 P.2d 737 (1980)
16. People v. Smith, Colo.App., 622 P.2d 90 (1980)

   People v. Siemien, Colo.App., 671 P.2d 1021 (1983)
17. Saunders v. State, Del.Supr., 401 A.2d 629 (1979)
18. Commonwealth v. Futch, Pa., 424 A.2d 1231 (1981)

C. NO RIGHT TO PARTICULAR JURY

19. Walton v. State, 279 Ark. 193, 650 S.W.2d 231 (1983)
20. Booker v. State, Miss., 449 So.2d 209 (1984)

D. FEDERAL CONSTITUTION NOT INVOLVED

21. Doepel v. United States, D.C. App., 434 A.2d 449 (1981)

E. NEW RULES

22. People v. Wheeler, 148 Cal.Rptr. 890, 583 P.2d 748 (1978)

23. Commonwealth v. Soares, 377 Mass. 461, 387 N.Ed.2d 499 (1979)

24. State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980)

25. State v. Neil, Fla., 457 So.2d 481 (1984)

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. IS A TRIAL COURT REQUIRED BY THE UNITED STATES CONSTITUTION TO RESTRICT THE USE OF PEREMPTORY CHALLENGES BY THE PROSECUTION IN A PARTICULAR CASE TO INSURE THAT A MEMBER (MEMBERS) OF THE DEFENDANT'S RACE IS NOT ELIMINATED FROM SERVING ON THE PETIT JURY SOLELY BECAUSE HE IS OF THE SAME RACE AS THE DEFENDANT?

II. IS THE ELIMINATION OF ALL MEMBERS OF THE DEFENDANT'S RACE FROM THE PETIT JURY BY PEREMPTORY CHALLENGE IN A PARTICULAR CASE PRIMA FACIE PROOF THAT THE DEFENDANT WAS DEPRIVE OF IMPARTIAL JURY COMPOSED OF PERSONS REPRESENTING A FAIR CROSS SECTION OF THE COMMUNITY?

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i.
TABLE OF CONTENTS	ii.
TABLE OF AUTHORITIES	iii.
REASONS WHY THE WRIT SHOULD NOT BE ISSUED	
I. AN ATTACK ON THE USE OF PREEMPTORY CHALLENGES TO THE VENIRE IN A CRIMINAL CASE AMOUNTS TO AN ATTACK ON THE JURY SYSTEM PER SE AS GUARANTED BY THE SIXTH AMENDMENT OF THE UNITED STATES	1 - 2
II. THERE HAS BEEN NO SUBSTANTIAL JUDICATORY CHALLENGE TO SWAIN V. ALABAMA IN THE TWENTY YEARS SINCE IT WAS DECIDED	2 - 3
III. THE EXCLUDING BY PREEMPTORY CHALLENGE ALL OF THE BLACK MEMBERS OF THE VENIRE IN THE SELECTION OF THE PETIT JURY DOES NOT VIOLATE THE SIXTH AMENDMENT	3 - 4
IV. SWAIN V. ALABAMA SHOULD BE LEFT IN TACT AS AUTHORITY FOR TRADITIONAL PEREMPTORY CHALLENGES BY DENYING THE WRIT IN THIS CASE	4 - 5
CONCLUSION	5
PROOF OF SERVICE	6

TABLE OF AUTHORITIES

	Page
Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979).....	2
Duncan v. Louisiana, 391 U.S. 145 (1968).....	4
Duren v. Missouri, 439 U.S. 357, 58 L.Ed.2d 579, 99 S.Ct. 664 (1979).....	4
Hayes v. Missouri, 120 U.S. 68, 78 30 L.Ed. 578, 580, 7 S.Ct. 350.....	2
Lewis v. United States, 146 U.S. 370, 36 L.Ed. 1011, 1014, 13 S.Ct. 136.....	1
McCray v. Abrams, 2nd Cir. 1984, 750 F.2d 1113.....	2
McCray v. New York, 103 S.Ct.Rep. 416 (1983).....	3
People v. Payne, 100 Ill.App.3d 1014, 426 N.E.2d 1046 (1st Dist. 1982).....	2
People v. Wheeler, 148 Cal.Rep. 890, 583 P.2d 748 (1978).....	2
State v. Raymond, ___R.I.___, 446 A.2d 743 (1982).....	4
Swain v. Alabama, 380 U.S. 202, 220 (1965).....	1
Taylor v. Louisiana, 419 U.S. 522, 42 L.Ed.2d 690, 95 S.Ct. 692 (1975).....	3
University of California Bd. of Regents v. Bakke, 438 U.S. 265, 319 (1978).....	4

Constitutional Provisions

Sixth Amendment.....	4
Fourteenth Amendment.....	4

REASONS WHY THE WRIT SHOULD NOT BE ISSUED

I.

AN ATTACK ON THE USE OF PEREMPTORY CHALLENGES TO THE VENIRE IN A CRIMINAL CASE AMOUNTS TO AN ATTACK ON THE JURY SYSTEM PER SE AS GUARANTED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

By definition a peremptory challenge to a member of the venire is the striking of the member from sitting on the jury at the uncontrolled discretion of a party in the case.

> "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subjected to the court's control." (Citations omitted). Swain v. Alabama, 380 U.S. 202, 220 (1965).
>
> * * * *
>
> "For it is, as Blackstone says, an arbitary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose. Lewis v. United States, 146 U.S. 370, 378, 36 L.Ed. 1011, 1014, 13 S.Ct. 136 Id. 380 U.S. 219.

The Constitution does not require the granting of peremptory strikes in a jury trial and, consequently, the practice can be eliminated by either legislation or court rule. Peremptory challenges could be taken away from the prosecution and be left only to the defendant or the tradition could be otherwise altered as the court sees fit. However, such action would be a radical departure from the procedure which has prevailed since the time of the common law.

> "The persistence of peremptories and their extensive use demostrates the long and widely held belief that peremptory challenge is a necessary part of trial by jury." Swain v. Alabama, supra at 380 U.S. 219.
>
> * * * *
>
> "Although historically the incidents of the prosecutor's challenge has differed from

> that of the accused, the view in this country has been that the systems should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held'. Hayes v. Missouri, 120 U.S. 68, 70, 30 L.Ed. 578, 580, 7 S.Ct. 350." Id. 380 U.S. 220.
>
> * * * *
>
> "In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." Id. 380 U.S. 222.

II.

THERE HAS BEEN NO SUBSTANTIAL JUDICATORY CHALLENGE TO SWAIN V. ALABAMA IN THE TWENTY YEARS SINCE IT WAS DECIDED.

The Petitioner has been hard put to find any substantial judicial dissatifaction with the opinion of the court in Swain. He has found two state court decisions, People v. Wheeler, 148 Cal.Rep. 890, 583 P.2d 748 (1978) and Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979). There is also the opinion of a lower appellate court in Illinois, People v. Payne, 106 Ill.App.3d 1034, 436 N.E.2d 1046 (1st Dist. 1982). [See PEOPLE V. PAYNE AND THE PROSECUTIONS PEREMPTORY CHALLENGES: WILL THEY BE PREMPTED? 32 DePaul Law Review page 399-431]

The Petitione has cited one federal circuit court opinion, McCray v. Abrams, 2nd Cir. 1984, 750 F.2d 1113 which is an aberrance from the conclusion announced in Swain upholding the use of peremptory challenges in their traditional sense of being entirely unregulated and unexamined by the court in a particular case.

The memorandum opinion dissenting from the denial of certiorari in McCray v. New York, 103 S.Ct.Rep. 438 1983 at page 2440 it is stated: "In the nearly two decades since it was decided, Swain has been the subject of almost universal and often scathing criticism'. But the footnote attached to this sentence only cites ten law review/law journal articles, no judicial opinions. It is a matter of general knowledge that the analytical treatises of legal theorists are often at odds with the constitutional law announced by this court.

In summary, complaints against Swain v. Alabama in actual cases have to date been minimal; the states can adopt a different standard of jury selection from the constitutional mimimum as was done in Wheeler and Soares; only one case in the federal circuits has failed to follow Swain.

III.

THE EXCLUDING BY PEREMPTORY CHALLENGE ALL OF THE BLACK MEMBERS OF THE VENIRE IN THE SELECTION OF THE PETIT JURY DOES NOT VIOLATE THE SIXTH AMENDMENT.

In Taylor v. Louisiana, 419 U.S. 522, 42 L.Ed.2d 690, 95 S.Ct. 692 (1975) this Court held that the selection of a petit jury from a representative cross section of the community was an essential component of the Sixth Amendment right to a jury trial and that a defendant had standing to object to the exclusion of women from his jury even though he was not a member of the excluded class. However, the court expressly stated --

> "It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition. (Citations omitted).

But the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representive thereof." 419 U.S. 538.

Thus, a consideration of the Sixth Amendment, lacking in Swain, left unchanged this Court's conclusion in Swain upholding the use of peremptory challenges. Duren v. Missouri, 439 U.S. 357, 587 L.Ed.2d 579, 99 S.Ct. 664 (1979) followed Taylor but the composition of the final petit jury was not discussed.

IV.

SWAIN V. ALABAMA SHOULD BE LEFT IN TACT AS AUTHORITY FOR TRADITIONAL PEREMPTORY CHALLENGES BY DENYING THE WRIT IN THIS CASE.

Since this Court's decision in Duncan v. Louisiana, 391 U.S. 145 (1968), incorporating the Sixth Amendment right to a jury trial in state criminal proceedings, this Court has cited repeatedly to Swain as authority. See, e.g., University of California Board of Regents v. Vakke, 438 U.S. 265, 319 and footnote 53 1978.

"Thus, under either the Fourteenth Amendment analysis of Swain or the Sixth Amendment cross sectional analysis of Taylor and Duren, inquiry into the reasons for exercising peremptory challenges should be limited to the extreme situtation in which the peremptory challenge has been used consistently to exclude groups in a signicant number of cases and not just within the particular case before the court. Unless a consistent under-representation is demonstrated, there should be no constitutional violation." 32 DePaul Law Review 418, supra.

This reasoning was followed by the Rhode Island Supreme Court in State v. Raymond, ___ RI ___, 446 A.2d 743 (1982). In that case the court focused on Taylor, Duren, and

Swain, and ruled that even under the Sixth Amendment cross sectional analysis, systematic exclusion through the use of peremptory challenges must be demonstrated on a case after case basis and not within the context of a particular case.

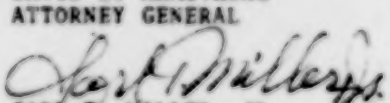
The goal for our judicial system should be to administer justice without regard to color, race, or class. Whatever may or may not be the merits of quotas or affirmative actions in regard to such matters as education, public and private employment, housing, etc., they have no place in the system of justice. Discrimination against discreet groups should be exposed and eliminated but peremptory challenges should continue to be accorded to all parties in a jury trial without any limitation or examination by the trial court.

CONCLUSION

The Petition for Writ of Certiorari to the Supreme Court of Kentucky herein should be denied.

Respectfully submitted,

DAVID L. ARMSTRONG
ATTORNEY GENERAL



CARL T. MILLER, JR.
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601-3494

COUNSEL FOR RESPONDENT

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the Brief in Opposition has been mailed, postage prepaid, to Hon. Frank W. Heft, Jr., Chief Appellate Defender, 700 Civic Plaza, 719 West Jefferson Street, Louisville, KY 40202 on this the 24th day of March, 1995.

Assistant Attorney General

Supreme Court, U.S.
FILED
JUN 17 1985
ALEXANDER L. STEVAS

No. 84-6263

In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES KIRKLAND BATSON, PETITIONER

v.

COMMONWEALTH OF KENTUCKY, RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

JOINT APPENDIX

FRANCIS WILLIAM HEFT, JR.
JAMES DAVID NIEHAUS
Jefferson District Public Defender
719 West Jefferson
Louisville, Kentucky 40202
(502) 587-3800
Counsel for Petitioner

CARL T. MILLER, JR.
Assistant Attorney General
of Kentucky
Capitol Building, Suite 34
Frankfort, Kentucky 40601
(502) 564-4047
Counsel for Respondent

PETITION FOR CERTIORARI FILED FEBRUARY 19, 1985
CERTIORARI GRANTED APRIL 22, 1985

18 pp

INDEX

	Page
Chronological List of Relevant Docket Entries	1
Transcript of Evidence and Proceedings Excerpts	2
Opinion of the Kentucky Supreme Court rendered December 20, 1984	5
Supreme Court order dated April 22, 1985, granting certiorari and leave to proceed in forma pauperis	10

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 6, 1982—Indictment charging second degree burglary, receipt of stolen property valued at more than $100.00 and second degree persistent felony offender status returned by the Jefferson County Grand Jury.

February 14-15, 1984—Jury trial in Jefferson Circuit Court. Petitioner was convicted of second degree burglary, receipt of stolen property valued at more than $100.00, and second degree persistent felony offender status.

March 20, 1984—Judgment entered in Jefferson Circuit Court sentencing Petitioner to a 20-year term of imprisonment.

December 20, 1984—Supreme Court of Kentucky renders its Opinion affirming the judgment of conviction.

February 19, 1985—Petition for Writ of Certiorari filed in this Court.

April 22, 1985—Writ of Certiorari granted.

TRANSCRIPT OF EVIDENCE AND PROCEEDINGS EXCERPTS

[5] (Colloquy)

(At this point, the jury panel was seated in the courtroom in alphabetical order, voir dire examination was conducted but was specifically excluded from request for transcript per the Designation of Proceedings; strikes made by respective counsel, extra jurors excused and exited the courtroom, and the jury was seated in the jury box as follows:)

THE CLERK: As I call your name, the sheriff will conduct you to your seat in the jury box.

Juror Number One, Ruth Ran; Juror Number Two, Elsie Dupin; Juror Number Three, Richard Carroll; Juror Number Four, Dena Meece; Juror Number Five, Samuel Dabney; Juror Number Six, Lucia Vibert; Juror Number Seven, Carolyn Bunger; Juror Number Eight, Joseph Gaines; Juror Number Nine, Patrick Yarber; Juror Number Ten, Dona Estes; Juror Number Eleven, Joyce Smith; Juror Number Twelve, Arthur Dickerson; Juror Number Thirteen, Anthony Ferg.

THE CLERK: All right. Would you please stand and raise—

MR. DOWELL: Your Honor, may we approach the bench for a minute, please?

[6]

(WHEREUPON, counsel for the Commonwealth and the Defendant approached the bench where a conference was held in whispered tones, out of the hearing of the jury, as follows:)

MR. DOWELL: Your Honor, prior to the swearing of the jury, I would like to make a motion to discharge the panel on the following grounds.

There were four—I would like the Record to reflect—and, also, I would like it if we could have a hearing on this outside the hearing of the jury; I would like to re-

quest that—but there were four black jurors on the case. After I reviewed my notes, I noted that all four of them were struck by the Commonwealth's pre-emptories. The jury now, as empanelled, I want the Record to reflect, is an all-white panel.

I submit that under these circumstances, the defendant is being denied his right to an impartial trial, a cross-section of the community, under the Sixth and Fourteenth Amendment. He's also being denied equal protection of the law under the U.S. Constitution. And he's also being denied a fair, impartial trial.

[7] THE COURT: You want to have a hearing on this, don't you?

MR. DOWELL: Yes, Your Honor.

THE COURT: All right. I will pick up in just a minute.

MR. DOWELL: I would object to the swearing of the jury at this time.

THE COURT: I'm going to overrule because it has to be a cross-section of the whole, entire panel and that selection process.

Anybody can strike anybody they want to.

MR. DOWELL: Does the Court agree—essentially, the facts I'd want to establish at a hearing are, number one, that there were four black jurors in the panel and that the Commonwealth exercised its pre-emptories as to those, all four black jurors.

THE COURT: Well, they can do it if they want to.

MR. DOWELL: Do you accept that as true? Is that accurate, Mr. Gutmann?

MR. GUTMANN: Yeah, during this particular—yeah, I struck four blacks and [8] two whites.

MR. DOWELL: Okay. And that this left an all-white jury. Is that right?

MR. GUTMANN: In looking at them, yes; it's an all-white jury.

MR. DOWELL: Okay. I would assert that that violates the constitutional provisions, so I just asserted in

absence of any, you know, compelling justification that that denies the defendant of equal protection of law, denies him his right to a fair cross-section and a fair and impartial jury.

THE COURT: You're talking about the cross-section selection process of the panel itself, if that happened. Out of Frankfort where they draw them by computer, you might have a point, but this is different.

MR. DOWELL: Okay. So my motion, my objection to the swearing of this jury is overruled?

THE COURT: Yes.

MR. DOWELL: And also my motion to set aside is overruled?

THE COURT: That's right.

[9] MR. DOWELL: Okay. Thank you, Your Honor.

MR. GUTMANN: Thank you.

(End of conference at bench.)

• • • •

THE COURT: All right. Swear the jury.

THE CLERK: Will you stand and raise your right hand, please.

(WHEREUPON, the jury having been duly sworn by the Clerk of the court, proceedings continued as follows:)

THE COURT: Now, all the jurors that have not been selected for one reason or another, I appreciate your being over here. We always have to have a panel large enough to select the twelve or thirteen that try the case.

Thank you very much. You can go back to the Jury Pool and maybe you can pick up another case in there.

(At this point, the "extra" jurors were excused and exited the courtroom.)

THE COURT: I'm going to call for a fifteen-minute break here now. You all have been sitting——————

SUPREME COURT OF KENTUCKY

No. 84-SC-733-MR

JAMES KIRKLAND BATSON, APPELLANT

v.

COMMONWEALTH OF KENTUCKY, APPELLEE

Rendered: December 20, 1984

[Date Jan. 10, 1985]

Appeal from Jefferson Circuit Court
Honorable George Ryan, Judge
No. 82-CR-0010

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, James Kirkland Batson, was convicted by a jury in the Jefferson Circuit Court of second-degree burglary and receiving stolen property over $100.00. Punishment was raised to 20 years for both counts after the establishment of second-degree persistent felony offender status.

Appellant was convicted of burglarizing the home of Mrs. Henrietta Spencer and her husband in September of 1981. Mrs. Spencer testified that while she was sitting in her living room with her husband, she felt a draft,

heard a noise, and then saw a young black man stooping in their front doorway and taking purses which were hanging on a doorknob in the next room. Among the property lost in the burglary were three ladies' rings. Mrs. Spencer later identified the appellant as the man she saw by picking his photograph out of a photopack. The Spencers' neighbor, Regina Cornellius, stated to police that on the day of the burglary she saw appellant Batson standing between her house and the Spencers', and later saw him running away from the back of the Spencers' house. Appellant produced a witness at trial, Lee Weese, an investigator for the public defender, who testified that Mrs. Cornellius gave him a statement some six months later that appellant Batson appeared to be standing guard and that there was another person whom she did not know standing at the front of the Spencers' house with a chair.

Appellant's conviction for receipt of stolen property arose from an incident where appellant Batson and co-indictee Larry Macklin appeared together at a pawn shop where Batson pawned a Caravelle watch and Macklin pawned two ladies' rings. The two rings were later identified by Mrs. Spencer as belonging to her. Batson was charged with having acted alone or in complicity with Macklin on this charge, but Macklin is not a party to this appeal.

Appellant charges the trial court with four errors in his appeal. First of all, appellant argues that the evidence at trial did not exclusively support the felony charge of receiving stolen property in an amount over $100, and therefore the trial judge erred in refusing appellant's tendered instructions on the misdemeanor charge of receipt of stolen property under $100.00. A trial court is bound to give instructions applicable to every state of the case deducible or supported by the testimony, including instructions on lesser-included offenses where there could be reasonable doubt as to the greater offense. *Kelly v. Commonwealth, Ky.*, 267 S.W.2d

536 (1954), and *Luttrell v. Commonwealth, Ky.*, 554 S.W. 2d 75 (1977). The evidence at trial concerning value consisted of testimony by Mrs. Spencer that one of the rings had a fair-market value of $110.00, and the testimony of the pawnbroker that the replacement value of the two rings was in excess of $100.00 although he allowed only $15.00 for each ring. The record shows that it was his practice to give only a small percentage of an item's full value in pawn. Thus, the evidence of the pawn value of the rings is irrelevant to an accurate determination of their fair-market value. There was no evidence from which it could reasonably be inferred that the fair-market value of the rings was less than $100.00.

Appellant's second assertion of error is that he was denied a fair trial due to the trial court's refusal to provide his counsel with a transcript of a previous trial on the same charge which ended in a mistrial. Appellant relies on *Britt v. North Carolina*, 404 U.S. 226, 92 S. Ct. 431, 30 L. Ed.2d 400 (1971), which stands for the proposition that a state must provide an indigent defendant with the transcript of a prior trial if needed for an effective defense. Appellant asserts that his need for a transcript can be seen by the inherent value of a transcript of prior proceedings as a discovery device or impeachment tool, and by a situation which occurred at trial wherein a transcript allegedly was sorely missed. Appellant points to a situation where a Commonwealth's witness testified inconsistently with his testimony at the previous trial. Later, during the appellant's case-in-chief, appellant's counsel sought to have the court reporter read notes of the prior testimony, but was refused by the trial court. A later avowal of the testimony clearly showed the inconsistency. However, the record shows the trial court's refusal to allow the court reporter's notes to be read was simply that any impeachment of the witness should have occurred while he was on the stand during cross-examination, and not by the introduction of evidence during the defense's case-in-chief. The

trial court showed no disposition to restrict appellant's access to the court reporter's notes.

Britt specifically holds that where adequate alternatives exist, a trial court need not provide an indigent defendant with a transcript of prior proceedings. Since the same counsel represented the appellant during both trials, and the trial court showed no inclination to restrict appellant's use of the court reporter's notes, we hold the appellant was not denied a fair trial due to the refusal to supply him with a free transcript.

Appellant next contends that it was error to permit the prosecuting attorney to exercise preemptory challenges to all of the blacks who were called as jurors in this case. Appellant acknowledged that the United States Supreme Court in *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), held that preemptory challenges against blacks, by themselves, do not violate the Fourteenth Amendment equal-protection clause. However, appellant urges this court to adopt the position of other states based upon the Sixth Amendment and their own state constitutions, that preemptory challenges against minority groups can be unconstitutional if they were shown to be a pattern of challenges against jurors from a discrete group and a likelihood that the challenges were based solely on group membership. *People v. Wheeler*, 583 P.2d 748 (Cal. 1978), and *Commonwealth v. Soares*, 387 N.E.2d 499 (Mass. 1979). We have recently reaffirmed our reliance upon *Swain* in *Commonwealth v. McFerron, Ky.*, —— S.W.2d —— (1984), holding that an allegation of the lack of a fair cross-sectional jury which does not concern a systematic exclusion from the jury drum does not rise to constitutional proportions, and we decline to adopt another rule.

Appellant finally contends the trial court erred in refusing to admit testimony of a witness concerning the physical description of Larry Macklin. He sought to offer this testimony to show that Larry Macklin fitted the description of the perpetrator of the crime and that

the identification of appellant by Mrs. Spencer may have been mistaken. By avowal the witness, Detective Robert Rutledge, stated that the arrest sheet showed that Larry Macklin was a black male weighing 170 pounds and was twenty-nine years old.

Larry Macklin was a codefendant with appellant but was tried separately. One witness testified that an unidentified person was seen fleeing the Spencer premises. Mrs. Spencer saw only one person inside her house. She identified appellant as that person. Evidence of any striking similarity between Macklin and appellant would be admissible as to the credibility of the identification by Mrs. Spencer, but the testimony offered was of such a general nature that it could have little, if any, effect upon the credibility of Mrs. Spencer. Further, the proffered testimony was properly excluded as hearsay. We conclude the exclusion of the testimony was not error.

The Judgment is affirmed.

All concur.

ATTORNEY FOR APPELLANT:

J. David Niehaus
Office of the Jefferson
District Public Defender
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202

ATTORNEYS FOR APPELLEE:

David L. Armstrong
Attorney General
Paul Reilender, Jr.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER

v.

KENTUCKY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KENTUCKY

ON CONSIDERATION of the motion fo leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 22, 1985

Office-Supreme Court, U.S.
FILED
JUN 27 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-6263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES KIRKLAND BATSON, *Petitioner,*

v.

KENTUCKY, *Respondent.*

On Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF FOR PETITIONER

J. DAVID NIEHAUS
Deputy Appellate Defender of the
Jefferson District Public Defender
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
(502) 587-3800
Counsel for Petitioner

FRANK W. HEFT, JR.
Chief Appellate Defender of the
Jefferson District Public Defender
Co-Counsel for Petitioner

DANIEL T. GOYETTE
Jefferson District Public Defender
Of Counsel

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

BEST AVAILABLE COPY

QUESTION PRESENTED

In a criminal case, does a state trial court err when, over the objection of a black defendant, it swears an all white jury constituted only after the prosecutor had exercised four of his six peremptory challenges to strike all of the black veniremen from the panel in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community?

TABLE OF CONTENTS

	Page
STATEMENT	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
CONCLUSION	35

TABLE OF AUTHORITIES

CASES: Page

Alexander v. *Louisiana*, 405 U.S. 625 (1972) 10
Avery v. *Georgia*, 345 U.S. 559 (1953) 10
Baron v. *Baltimore*, 7 Pet. 243 (1833) 8
Carter v. *Jury Commission*, 396 U.S. 320 (1970) 18
Commonwealth v. *Dorsey*, 7 Browne 412, 103 Mass. Rpts. 412 (1869) 21, 22, 23
Commonwealth v. *Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979) 26
Duncan v. *Louisiana*, 391 U.S. 145 (1968) 11, 15, 25
Duren v. *Missouri*, 439 U.S. 357 (1979) 25
Eubanks v. *Louisiana*, 356 U.S. 584 (1958) 10
Ex Parte Virginia, 190 U.S. 339 (1880) 9
Fant v. *Buchanan*, 17 So. 371 (Miss., 1895) 9
Fay v. *New York*, 332 U.S. 261 (1947) 14, 15
Gaines v. *Washington*, 277 U.S. 81 (1928) 9
Glasser v. *United States*, 315 U.S. 60 (1942) 13, 16
Hill v. *Texas*, 316 U.S. 400 (1942) 10
Maxwell v. *Dow*, 176 U.S. 581 (1900) 9, 10
McCray v. *New York*, 461 U.S. 961 (1983) 11, 31, 33
In Re Murchison, 349 U.S. 133 (1955) 31
Neal v. *Delaware*, 103 U.S. 370 (1881) 10
Norris v. *Alabama*, 294 U.S. 587 (1935) 10
Oregon v. *Haas*, 420 U.S. 714 (1975) 33
People v. *Garbutt*, 17 Mich. 9 (1868) 12
People v. *Hall*, 197 Cal.Rptr. 71, 672 P.2d 854 (1983) .. 31, 32
People v. *Nurse*, 475 N.E.2d 1000 (Ill.App. 1 Dist., 1985) 34
People v. *Payne*, 99 Ill.2d 135, 457 N.E.2d 1202 (1983) .. 17
People v. *Wheeler*, 148 Cal.Rptr. 890, 583 P.2d 748 (1978) 4, 26, 27, 28, 29, 34, 35
Peters v. *Kiff*, 407 U.S. 493 (1972) 6, 19, 30
Pruneyard Shopping Center v. *Robbins*, 447 U.S. 74 (1980) 33
Rose v. *Mitchell*, 443 U.S. 545 (1979) 19
Sawyer v. *United States*, 202 U.S. 150 (1906) 22
Sealy v. *State*, 1 Kelly 213 (Ga. 1846) 21
Slaughterhouse Cases, 16 Wall 36; 84 U.S. 36 (1873) ... 9
Smith v. *Texas*, 311 U.S. 128 (1940) 10, 27
Sparf v. *United States*, 156 U.S. 51 (1894) 12

Table of Authorities—Continued

CASES: Page

State v. *Benton*, 19 N.C. 188 (1836) 22
State v. *Gilmore*, 199 N.J. Super. 389, 489 A.2d 1175 (1985)..... 18, 34
State v. *Wiley*, 698 P.2d 1244 (Ariz., 1985)..... 18, 34
Stilson v. *United States*, 250 U.S. 583 (1919)..... 23
Strauder v. *West Virginia*, 100 U.S. 303 (1880)..... 9, 17
Swain v. *Alabama*, 380 U.S. 202 (1965)..... 5, 6, 7, 10, 15, 18, 20, 21, 23, 27, 29, 33, 34
Taylor v. *Louisiana*, 419 U.S. 522 (1975)..... 4, 5, 6, 10, 15, 17, 18, 19, 25, 30
Thiel v. *Southern Pacific Co.*, 328 U.S. 217 (1946).... 13, 14
Turner v. *Fouche*, 396 U.S. 346 (1970)..... 18
Twitchell v. *Pennsylvania*, 7 Wall. 321, 74 U.S. 321 (1868) 8
United States v. *Clark*, 737 U.S. 679 (7th Cir., 1984)... 32
United States v. *Leslie*, 759 F.2d 366 (5th Cir., 1985) ... 8
United States v. *Marchant*, 12 Wheat 479 (1827)..... 22
United States v. *Shackelford*, 18 How 588 (1856)..... 22
Virginia v. *Rives*, 100 U.S. 313 (1880)..... 9
Walker v. *Sauvinet*, 92 U.S. 90 (1875)..... 9
Williams v. *Florida*, 399 U.S. 78 (1970)..... 25

CONSTITUTIONAL PROVISIONS:
United States Constitution, Amendments I-VIII 8
United States Constitution, Amendment VI 8
United States Constitution, Amendment VII..... 9
United States Constitution, Amendments XIII..... 9
United States Constitution, Amendments XIV 8

STATUTES AND RULES:
18 USCS § 243..... 19
18 USCS § 1861..... 8
Federal Jury Selection and Services Act of 1968, 28 USCS § 1861..... 16, 19
18 USCS § 1863..... 8
33 Edw. I, Stat. 4 (1305)..... 20,21
Fed.R.Evid. 404(b) 30
28 USC § 1257(3)..... 1

Table of Authorities—Continued

OTHER AUTHORITIES: Page

Babcock, Voir Dire: Preserving Its Wonderful Power, 27 Stan.L.Rev. 545 (1975) 33

The Origin of the Petty Jury, 27 Law Quarterly Review 347 (1911)..... 12

The Congress, the Court & Jury Selection . . . , 52 Va. Law Rev. 1069 (1966)..... 18

17 American and English Encyclopedia of Law, 2 ed., "Jury and Jury Trial", § 7(6), p. 1190-1191 (1898)... 21

24 Cyclopedia of Law and Procedure, "Juries", § 13(c), p. 311-312 (1907) 21

24 Cyclopedia of Law and Procedure, "Juries" §C(11) p. 352-353 (1907) 23

17 American and English Encyclopedia of Law, "Jury and Jury Trial", §5(b), p. 1178-1181 (1898) 23

II Wigmore, *Evidence*, § 302, Theory of Evidencing Intent, p. 241-247 (Chadbourne Rev., 1979) 28

26 Halsbury's Laws of England, 4 ed., para. 624; 626; p. 325-326 (1979) 21

2 Schwartz, The Bill of Rights: A Documentary History (1971)..... 23, 24

I Stephan, *History of the Criminal Law in England;* London (1883)..... 20, 21

2 LaFave and Israel: *Criminal Procedure, § 21.3(d) "Peremptory Challenges," p. 739 (1984)* 7

OPINIONS BELOW

The Supreme Court of Kentucky affirmed the Judgment entered against Petitioner in an unpublished opinion rendered on December 20, 1984. (App., p. 5). No written opinion was filed with the circuit court judgment of conviction entered on March 20, 1984.

GROUNDS OF JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 USC § 1257(3) because, as the question set out above shows, Petitioner claims that the rights to impartial jury and to a jury made up of a cross-section of the community under the Sixth and Fourteenth Amendments has been abrogated. The Supreme Court of Kentucky affirmed Petitioner's conviction in an unpublished opinion rendered on December 20, 1984. The Petition for Writ of Certiorari was filed on February 19, 1985, and was granted on April 22, 1985. The petition for writ was timely filed under Sup.Ct.R. 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

SIXTH AMENDMENT

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed***

FOURTEENTH AMENDMENT, Section One

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case was commenced by the return of Indictment No. 82-CR-0010 by the Jefferson County, Kentucky, Grand Jury on January 6, 1982. (Transcript of Record (TR), p. 1-3). That Indictment alleged that Batson committed the offenses of second degree burglary and receipt of stolen property valued at more than $100.00 (TR, p. 1). The Indictment charged also that Petitioner was a second degree persistent felony offender and liable to enhanced punishment upon conviction for the two substantive offenses.

In support of the first charge, the prosecution introduced a Mrs. Spencer who lived in the house where the break-in occurred. She saw Petitioner Batson crouched down in another room of her house. Then Batson and her purse containing watches, rings and cash disappeared. (Transcript of Evidence (TE), p. 19-22). The second charge was supported by the testimony of a pawnbroker who said that Batson and another pawned property taken from Mrs. Spencer. This was done shortly after the break-in. (TE, p. 135-139; 140). Trial was had in Jefferson Circuit Court on February 14-15, 1984. (TR, p. 211). Batson was convicted both of burglary and of receipt of stolen property. (TR, p. 212). Because he was found to be a persistent felony offender (TR, p. 212), Batson was sentenced to a term of 20 years imprisonment by Judgment dated March 20, 1984. (TR, p. 222-223).

The error complained of here occurred after the jury had been examined and challenged on voir dire and after the peremptory strikes had been made by counsel. (TE, p. 5; TR, p. 119-120). Batson's trial lawyer moved to discharge the panel on the ground that all four black jurors who had been included in the venire had been struck by the prosecutor's peremptory challenge and that an all-

white jury resulted. Under those circumstances, counsel continued, Petitioner was denied "his right to an impartial trial [sic], a cross-section of the community under the Sixth and Fourteenth Amendments. He's also being denied equal protection of the law under the United States Constitution. And he's also being denied a fair, impartial trial." (TE, p. 6; App., p. 3). Counsel then objected to the swearing of the jury. (TE, p. 7; App., p. 3).

In a colloquy with the prosecutor and with the trial judge, Batson's lawyer elicited the following statements:

> Does the Court agree—essentially, the facts I'd want to establish at a hearing are, number one, that there were four black jurors on the panel and that the Commonwealth exercised its pre-emptories [sic] as to those, all four black jurors.
>
> THE COURT: Well, they can do it if they want to.
>
> Q Do you accept that as true? Is that accurate, Mr. Gutmann?
>
> A Yeah, during this particular—yeah. I struck four blacks and two whites.
>
> Q Okay. And that this left an all-white jury. Is that right?
>
> A In looking at them, yes; it's an all-white jury. (TE, p. 7-8; App., p. 3).[1]

To Batson's renewed arguments about denial of equal protection of the law, of fair cross-section of the community and fair and impartial jury, the trial judge stated that those complaints were relevant only to the selection of the panel, not to the selection of the petit jury for a particular case. (TE, p. 7; App., p. 3-4). The objection to

---

[1] Batson is, of course, a black man. (TE, p. 171-173; also App., p. 6).

swearing the jury and the motion to set aside the panel were overruled. (TE, p. 8; App., p. 4). The jury was sworn and returned verdicts of guilty as to all three charges contained in the Indictment. (TE, p. 9; App., p. 4; TR, p. 211).

SUMMARY OF ARGUMENT

This brief is premised on the belief that the concept of the jury as a fair cross-section of the community announced in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), was designed to secure a trial jury that is representative of the community and not simply to create a representative panel or venire from which the prosecutor can exclude groups of people by means of peremptory challenges. Petitioner here proposes a remedy for improper use of peremptory challenges similar to that found in *People* v. *Wheeler*, 148 Cal.Rptr. 890, 583 P.2d 748 (1978), which permits a defendant to question the prosecutor's peremptory challenges when it appears that those challenges are being used to exclude a particular group of people. The remedy is required because none of the previous approaches to ending discrimination in the selection and empanelling of the jury has been satisfactory. The remedy proposed is based on a simple and well-known principle of evidentiary inference which at once provides a solution to the problem of discrimination by exclusion of groups and prevents undue restriction on the use of peremptory challenges by the prosecutor. As shown herein, the remedy proposed is simply to apply Wigmore's "doctrine of chances" on a reasonable scale to discern the intent of the prosecutor when he exercises his privilege of peremptory challenges. Where, as here, the prosecutor uses all or most of his peremptory challenges to remove black people from the jury, a reasonable inference arises that he may be excluding only on the basis of race and is

thus defeating, by means of state statutory privilege, the defendant's constitutional right to a representative jury. Present practice under *Swain* v. *Alabama*, 380 U.S. 202 (1965), forecloses any action on this inference. It is, therefore, necessary for the Court to declare that state practice with regard to peremptory challenge may be questioned by a criminal defendant in order to assure trial by a representative jury.

ARGUMENT

A PROSECUTOR IN A STATE CRIMINAL ACTION CANNOT USE PEREMPTORY CHALLENGES AFFORDED HIM BY STATE LAW TO EXCLUDE ALL OR MOST OF A READILY IDENTIFIABLE GROUP. SUCH EXERCISE OF PEREMPTORY CHALLENGES CREATES AN INFERENCE THAT THE CHALLENGES ARE BEING USED TO DENY THE ACCUSED A JURY REASONABLY LIKELY TO BE A FAIR CROSS-SECTION OF THE COMMUNITY.

(A) Introductory

This case squarely presents the question of whether the use by a state prosecutor of his peremptory challenges to remove all black persons remaining after challenges for cause from a jury panel denies a black defendant the right to a jury made up of a cross-section of the community. Proper disposition of the question requires application of existing law to cover the situation. The Court must state, precisely and clearly, that the cross-section of the community jury requirement made applicable to the states in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), includes the empanelling of the petit jury as well as the procedure by which the panels are composed. The guiding concept must be that the prosecutor, as agent for the state, cannot be allowed to interfere with the random and racially neutral

procedures by which a jury should be selected. In short, the Court must rule that the state may not do indirectly through the prosecutor what it cannot do directly through its jury commissioners. If the goal of jury composition and selection is to obtain a mix of persons of varied backgrounds and experiences, *Taylor* v. *Louisiana*, cited above; *Peters* v. *Kiff*, 407 U.S. 493, 503 (1972), then it is illogical and unreasonable to make a distinction between the acts of the jury commissioner who chooses only whites for jury service (which acts are promptly set aside) and the acts of the prosecutor who "fine tunes" the jury by removing the blacks who remain after challenges for cause are made. The Court in its recent cases has required racially neutral procedures where the securing of names and the initial qualification of jurors are concerned. The Court must require the same neutrality throughout the entire process of selection and empanelling.

In opposition to the claim for peremptory challenges free from racially discriminatory motives, the principle of *Swain* v. *Alabama*, 380 U.S. 202 (1965) is invariably cited. There, the Court noted without unfavorable comment that peremptory challenges were often exercised on the grounds of race, religion or nationality and that the Equal Protection Clause of the Fourteenth Amendment would not be employed to subject the prosecutor's use of peremptory challenges to examination in any one case. The Court held that such limitation would too greatly impair the usefulness of such challenges to the prosecutor. *Swain* v. *Alabama*, cited above, at 220-222. Successful attack on the improper use of peremptory challenges, under *Swain*, was put on a basis of showing that over a period of time the prosecutor had used the peremptory challenge time and again to exclude black people from petit juries. *Swain*, cited above, at 227. The result of this

ruling has been to foreclose successful challenge of improper use of peremptory challenges.

> Although courts are inclined to say that the defendant's burden of showing such systematic exclusion by the prosecutor 'is not insurmountable,' experience has clearly indicated the virtual impossibility' of doing so. A great many cases are to be found holding the defendant did not meet this burden, but there are almost none ruling that the defendant had established such systematic exclusion by the prosecutor's use of his peremptory challenges. This being so, courts have not had occasion to address the conundrum posed by this branch of *Swain:* whether, assuming proof of systematic exclusion, the prosecutor is now barred from using his peremptory strikes against black jurors, or whether it is then merely necessary that the prosecutor give some explanation for such strikes, such as that it is his view that black jurors would unduly favor a black defendant (the kind of contention, as noted earlier, which the peremptory challenge has served to keep out of sight). 2 LaFave & Israel, *Criminal Procedure* §21.3(d) "Peremptory Challenges," p. 739 (1984).

The lack of utility of the *Swain* rule, as evidenced by the continued complaints of racially discriminatory use of peremptory challenges, calls for reconsideration of the question disposed of in that case. Two significant decisions rendered by the Court since *Swain* was issued in 1965 provide the means to attack the improper use of peremptory challenges without unduly restricting their use by the prosecutor. And since no other means employed has worked to remove this problem, it is necessary to create a new rule by which the prosecutor's actions can be judged and regulated. To illustrate the desirability of the suggested change, it is necessary first to examine the alternatives that have been employed to attack the

problem. The lack of a workable alternative to the proposal made here demands adoption of the rule proposed in this brief.

(B) Equal Protection Analysis

At this point, it is useful first to distinguish the Court's role in relation to the states from that as the supervisory body of the federal court system. In the federal system, the problem of discriminatory use of peremptory challenges may be settled in the manner employed in *United States* v. *Leslie*, 759 F.2d 366 (5 Cir. 1985). There discriminatory use of peremptory challenges was disapproved in the interest of justice and under the supervisory power of the appeals court. *United States* v. *Leslie*, cited above, at 373. The Congress has also imposed a requirement that all litigants in a federal court who are entitled to a jury must have "grand and petit juries selected at random and from a fair cross-section of the community . . ." 18 USCS §1861. This right is secured by requirement that each district court devise and use a written plan to achieve the objectives of the act. 18 USCS §1863. And, of course, the Court may construe the Sixth Amendment to the Constitution to meet the problem of improper use of peremptory challenges. But, when the problem of improper use of peremptory challenges in state courts is raised, considerations of federalism are important. Historically, the response of the Court has been limited by the prevailing attitude toward federal intervention in what has long been perceived to be a "state" matter.

In *Baron* v. *Baltimore*, 7 Pet. 243 (1833), the Court held that Amendments 1-8 were applicable only to federal matters. The states were, therefore, free to regulate or even deny jury trial as they chose. Later, in *Twitchell* v. *Pennsylvania*, 7 Wall. 321, 74 U.S. 321 (1868), the *Sixth*

Amendment right to jury trial was considered and held applicable only to federal trials. The enactment of the Fourteenth Amendment did not affect the prevailing view of the Sixth Amendment right to jury trial (e.g. *Fant* v. *Buchanan*, 17 So. 371 (Miss. 1895); *Walker* v. *Sauvinet*, 92 U.S. 90 (1875), Seventh Amendment case). As late as 1928, the Court held that the Sixth Amendment applied to federal matters only. *Gaines* v. *Washington*, 277 U.S. 81, 85 (1928). It is against this background that the line of cases which culminated in *Swain* developed.

Blacks in the South after the Civil War relied on the various civil rights bills and on the provisions of the newly adopted Thirteenth and Fourteenth Amendments, the latter of which guaranteed due process of law and equal protection of the laws, to protect their rights. The common belief at the time was that a jury trial was not a component of due process of law. In 1900, the Court so held in *Maxwell* v. *Dow*, 176 U.S. 581, 603 (1900). Therefore, blacks seeking relief from discriminatory practices could proceed only on the theory of privileges and immunities as citizens of the United States [which was dispatched in the *Slaughterhouse Cases*, 16 Wall. 36, 84 U.S. 36 (1873)] or the theory of denial of equal protection of the laws. Proceedings under the equal protection theory resulted in three cases which formed the basis of all subsequent actions. The three cases, *Strauder* v. *West Virginia*, 100 U.S. 303 (1880); *Virginia* v. *Rives*, 100 U.S. 313 (1880); and *Ex Parte Virginia*, 100 U.S. 339 (1880), established the rule that if the state enacted laws which kept blacks off of juries, a black defendant was denied equal protection of the law *(Strauder)*, but that if an agent of the state disobeyed state laws in order to discriminate, "it ought to be presumed that the [state] court will redress the wrong." *Virginia* v. *Rives*, cited above, at 321-322. In essence, the Court declined to interfere in cases where

agents of the state discriminated against blacks unless the agents were following an improper law. This rule was changed by language in *Neal* v. *Delaware*, 103 U.S. 370 (1881), which held that the action of the agent was deemed the action of the state. *Neal* v. *Delaware*, cited above at 397. However, it has never doubted that the right of the citizen of a state to jury trial was to be protected in the first instance by the state. *Maxwell* v. *Dow*, 176 U.S. 581, 593 (1900). Throughout the twentieth century, cases involving discrimination in the selection of juries were handled under these principles.

> Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. * * * The principle is equally applicable to a similar exclusion of negroes from service on petit juries. * * * And although the state statute defining the qualifications of jurors may be fair on its face, the constitutional provision affords protection against action of the State through its administrative officers in effecting the prohibited discrimination. *Norris* v. *Alabama*, 294 U.S. 587, 589 (1935).

Under this rule, the obvious cases of discrimination were disposed of. *Hill* v. *Texas*, 316 U.S. 400 (1942); *Smith* v. *Texas*, 311 U.S. 128 (1940); *Avery* v. *Georgia*, 345 U.S. 559 (1953); *Eubanks* v. *Louisiana*, 356 U.S. 584 (1958); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972). Yet none of these cases considered to any significant degree the question of peremptory challenges as a discriminatory device. It is implicit in each of the decisions cited that a fairly constituted jury panel is all that a defendant needs and that a

fairly constituted panel necessarily results in a fair trial jury. *Swain* v. *Alabama* is another case of this type. 380 U.S. 202, 203-204 (1965). *Swain* was in part a case applying the rule set out above. 380 U.S. at 205. In *Swain*, the Court also considered the effect of peremptory strikes under the Alabama system which removed all blacks from the jury panel. At that time, the Court decided that the free exercise of peremptory strikes by the Alabama prosecutor should not be questioned in any individual case.

> The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. 380 U.S. at 219.

The Court refused "to subject the prosecutor's challenge in any particular case to *the demands and traditional standards of the Equal Protection Clause . . .*" 380 U.S. at 221. To justify inquiry into the prosecutor's motives for peremptory strikes or challenges under the Equal Protection Clause, the Court ruled, ". . . the defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time." *Swain* v. *Alabama*, cited above, at 227. The rule has effectively ended the employment of the Equal Protection Clause to combat improper use of peremptory challenges by the prosecutor. (See collection of comments and articles in *McCray* v. *New York*, 461 U.S. 961, 964, n.1 (1983). However, *Swain* was decided before the rendition of *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); and *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), which cases completed a line of opinions establishing the right of all persons to a jury composed of a cross-section of the community. The application of the cross-section idea to state jury trials shows the irrelevance of the *Swain* analysis to the present case and the need to condemn the actions by the prosecutor in the present case.

(C) Fair Cross-Section Analysis

The idea of the jury as a cross-section or representative of the community from which it is composed is not new. At common law, it is thought, the petty jury was formed by selecting representative members of the presentment (indicting) juries.

> By this means a larger representation of the whole county could be secured, and thus a fairer estimate placed upon the merits of the case, and a truer verdict given, without having to enlarge the jury by increasing the number until it became too bulky; that is, it was a simple system of representation of the representatives; the presentment juries being representatives of the hundreds and vills, and the petty or trial jury representative of the presentment juries. 27 LAW QUARTERLY REVIEW, "The Origin of the Petty Jury," 347, 358 (1911).

In the United States, the idea of the representative jury was not questioned. In 1771, John Adams wrote

> Juries are taken by lot or by sufferage, from the mass of the people, and no man can be condemned of life or limb or property or reputation without the concurrence of the voice of the people. *Sparf* v. *United States*, 156 U.S. 51, 143 (1894).

And the states also adopted the concept. In *People* v. *Garbutt*, 17 Mich. 9, 27 (1868), Judge Cooley wrote

> The trial of criminal cases is by a jury of the country, and not by the court. The jurors, and they alone, are the judge of the facts, and weigh the evidence. The law has established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any sin-

> gle man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and to justice.

Therefore, the cases of this Court striking down, on Sixth Amendment grounds, jury selection techniques which did not comport with this idea are in keeping with the long tradition of representative or cross-section juries.

In *Glasser* v. *United States*, 315 U.S. 60 (1942), the Court held that the "notion" of what constitutes a proper jury is "inextricably intertwined" with the idea of jury trial, 315 U.S. at 85. The Court refused to be bound entirely by historical concepts of the jury or jury trial but instead held

> Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community' (citation omitted).
>
> * * *
>
> And, its exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community' and not the organ of any special group or class. 315 U.S. at 85-86.

The term "cross-section" of the community was explained in *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946), by stating what the term does and does not comprehend.

> This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of

> the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury. 328 U.S. at 220.

At about the same time, the Court noted the difference between cases presented on the Sixth Amendment theory and cases presented from state courts pursuant to the Equal Protection Clause. In *Fay* v. *New York*, 332 U.S. 261, 282 (1947), the Court noted that the defendants in that case relied on the equal protection cases cited in part B of this brief to attack the composition of a "blue-ribbon" jury made up under a New York law. There the Court held that it would not interfere with the New York process of jury selection out of a sense of self-restraint and because the long history of unhappy relations between the two races has caused the Congress to put those cases "in a class by themselves." 332 U.S. at 282. The Court found significance in the fact that it had never interfered with the composition of state court juries except where the guidance of the Congress was available. 332 U.S. at 283. Thus, it was noted, the Fourteenth Amendment did not prohibit the state from excluding certain occupational groups. In a footnote, the Court declined to speculate whether the due process of law clause of the Fourteenth Amendment would prohibit racial discrimination in the selecting of state court juries. *Fay* v. *New York*, 332 U.S. at 284, fn.27. Thus, in this opinion, the Court foreclosed consideration of Sixth Amendment requirements as to

state juries or the use of the due process clause to solve the problem of discrimination in the selection of jurors. 332 U.S. at 287. The separation of theories continued throughout the period in which *Swain* v. *Alabama* was decided.

This intellectual climate was changed radically by the decision in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), which, relying on the Due Process of Law Clause of the Fourteenth Amendment, held that the right to jury trial is basic in the American system of jurisprudence and that, therefore, the Fourteenth Amendment "guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." *Duncan* v. *Louisiana*, cited above, at 149. The reason for jury trial was declared to reflect "a profound judgment about the way in which law should be enforced and justice administered."

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. 391 U.S. at 155.

The right to require a jury verdict was considered to provide a recourse to the common sense of the community in preference to reliance on the judgment, for good or ill, of one judge or even a group of judges. 391 U.S. at 156. Because jury trial is so basic to American values, the Court held, the demand for jury trial must be respected by the states.

The years following *Duncan* have seen a number of decisions refining the concept of jury trial under the Fourteenth Amendment. Obviously, the most important opinion for purposes of this case is *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). The issue there was stated to be

> Whether the presence of a fair cross section of the community on venires, panels or lists from which

> petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions. 419 U.S. at 526.

Relying on previous cases and upon the expression of policy found in the Federal Jury Selection and Service Act of 1968 (28 USC §1861 et. seq.), the Court held that

> . . . the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial. 419 U.S. at 528.

The cross-section is required to provide a prophylaxis against the exercise of arbitrary power by those charged with the administration of criminal justice. Excluding identifiable groups from service or restricting selection for service to certain special groups "cannot be squared with the constitutional concept of jury trial." 419 U.S. at 530.

It should be observed at this point that the holding and reasoning in *Taylor* are the products of a continual process of increasing the participation of all groups in the community in the judging of a defendant's guilt or innocence. This process began in feudal times in England when representatives of the knights of the hundreds and of the neighboring vills were called together to form the petty jury. And as noted in *Glasser* v. *United States*, 315 U.S. 60 (1942), the notions of the constitution of proper juries have developed with the "basic concepts of a democratic society and a representative government" *Glasser* v. *United States*, cited above at 85. It is this evolutionary growth of the concept of the ideal jury together with the constitutional requirement of a representative jury that demand statement of a rule prohibiting a state prosecutor from striking black people from a jury panel by means of peremptory challenges. In short, the Court should

extend the rule of *Taylor* by holding explicitly that the Sixth Amendment prohibits the use of peremptory strikes by a prosecutor to exclude all or most members of an identifiable class from participation as jurors. Further, it should be held that such action creates an inference that the challenges are used for improper purposes and that such acts so diminish the chance of a trial jury reasonably likely to represent a cross-section of the community that the jury must be discharged or the prosecutor required to explain his actions. The need for this rule is evident.

(D) Failure Of Previous Attempts To Resolve The Problem

A review of the decisions of this Court shows that all previous attempts to solve the problem of discrimination in the selection of juries have sought to do so indirectly, by providing for a pool of prospective jurors of such diverse character and of such numbers that it would be improbable that the prosecutor or any other court official could affect the representative character of the jury. This seems to have been the animating idea of both the equal protection cases arising from *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), and the fair cross-section cases which resulted in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). However, from the continued stream of complaints about discrimination in the use of peremptory challenges, it is patent that creation of a satisfactory panel from which to choose is not sufficient to prevent violation of the right to a representative jury. An example of the prevelance of the problem is found in a dissent filed in *People* v. *Payne*, 99 Ill.2d 135, 457 N.E.2d 1202, 1210 (1983). In that case, the dissenting justice listed 33 appellate cases that had alleged improper use of peremptory challenges, 23 of which had been filed since 1980. As shown by the Appendix to the Petition for Certiorari filed in this case, 24 states have had occasion to rule on the question presented

here since 1980. Appendix to Petition for Writ, pgs. 19-20. Since the Petition was filed in February, 1985, two other states, New Jersey and Arizona, have considered and ruled on cases involving the issue presented here. *State* v. *Gilmore*, 199 N.J.Super. 389, 489 A.2d 1175 (1985); *State* v. *Wiley*, 698 P.2d 1244 (Ariz., 1985). Clearly, the means adopted under either *Swain* or *Taylor* to correct abuses in the summoning of jurors do not prevent the perception that prosecutors can still pack a jury by striking the members of a group who show up for voir dire.

Other remedies proposed by the Court also attack the problem indirectly. In *Carter* v. *Jury Commission*, 396 U.S. 320 (1970), and *Turner* v. *Fouche*, 396 U.S. 346 (1970), the Court pointed out that the problem of discrimination might also be attacked by suits for injunction filed by those persons who have been wrongfully excluded from jury service. However, this remedy is of little use to the individual defendant. The benefit of juror suits would lie in the eventual cessation of discriminatory practices. However, in the meantime, the defendant would still suffer from the improper acts of the prosecutor.

Nor is there much hope that legislation might cure the problem. Only one serious effort has ever been made in this area. Title II of the proposed Civil Rights Bill of 1966 was drawn by the Justice Department in such a way as to allow the United States Attorney General to institute civil proceedings in federal district courts to eliminate discrimination in state court jury selection procedures. §203 of that bill would have allowed injunctive relief and would have permitted suspension of any state practice if it violated the prohibition of discrimination found in §201 of the Bill. 52 Virginia Law Review 1069, "The Congress, the Court and Jury Selection," p. 1084-1085 (1966). Whatever effect the Bill might have had was lost when both

Titles I and II of the Bill failed of passage.[2] Of course, since 1875, it has been a federal crime for any state officer charged with the selection or summoning of jurors to exclude or fail to summon any person because of improper racial reasons. 18 USCS §243. This statute has had no appreciable effect on the problem discussed here despite the Court's recent gloss on the statute in *Peters* v. *Kiff*, 407 U.S. 493 (1972). No other legislative attempts to correct discriminatory abuses have been made.

The continued existence of claims of discriminatory use of peremptory challenges in the states leads inevitably to the conclusion that the remedies adopted by the Court do not deal with the problem that exists. The prosecutor is still able, by means of his peremptory challenges, to frustrate the ideal of a representative jury made up of a cross-section of the community. As the Court recognized in a different context in *Rose* v. *Mitchell*, 443 U.S. 545, 558-59 (1979)

> For we also cannot deny that, 114 years after the close of the War Between the States . . . racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.

The rules enunciated in *Taylor* v. *Louisiana* and the other cases decided since 1968 deal admirably with the problem of keeping readily identifiable and often discriminated against groups off of the jury panel. However, the use of peremptories by a prosecutor presents a different problem that requires more particular treatment. The rule is

---

[2] Title I was resurrected and in 1968 was enacted as the Federal Jury Selection and Service Act of 1968. 28 USCS §1861.

to be fashioned by consideration of the prosecutor's purported right to peremptory challenge and the extent to which that "right" shall be allowed to frustrate the goal of a representative jury.

(E) The Prosecutor's "Right" Of Peremptory Challenges

The starting point for this examination is, of course, *Swain* v. *Alabama*, 380 U.S. 202 (1965), the case which is invariably and incessantly cited on the matter of peremptory challenges. In *Swain* it was held that the prosecutor has had for a long time a right of peremptory challenge in criminal trials, 380 U.S. at 214-218, and that the persistence and extensive use of the challenge demonstrate that peremptory challenge "is a necessary part of trial by jury." 380 U.S. at 219. However, it is important to reexamine the historical argument made in favor of the "right" of prosecutors to peremptory challenges. As shown below, the right of prosecutors in the United States to challenge jurors without statement of cause and without the possibility of denial by the trial judge is of recent vintage and in many states is not more than 125 years old.

The conventional wisdom on the matter is premised on comments made by Sir James Stephen in his *History of the Criminal Law in England*, published in London in 1883. Stephan discussed the effect of the enactment 33 Edw. I Stat. 4 (1305) which denied the Crown the right to challenge peremptorily but instead required showing of cause for each person challenged by the Crown. I Stephan, *History*, p. 302. Stephan did not doubt the existence of the defendant's right to peremptory challenges. The statute of 33 Edward I received a settled construction which allowed the Crown to "stand aside" jurors and not state cause until after the entire panel had been gone through. I Stephen, *History*, p. 303. In England, the same

procedure for challenging the jury still obtains. 26 Halsbury's Laws of England, 4 ed., para. 624; 626, p. 325-326 (1979). However, it is generally admitted that the right to stand aside was exercised sparingly. I Stephan, *History*, p. 302; 303. But, the exercise of challenge under the statute would, if a very large number of jurors were returned, "give the Crown what is nearly equivalent to a right of peremptory challenge." In *Swain* v. *Alabama*, 380 U.S. at 212, it was noted the "peremptories on both sides became the settled law of England, continuing in the above form until after the separation of the colonies." However, it is less important to know how the right survived in England than to know how the idea was received by the states at the time the Constitution and the Bill of Rights were adopted.

It appears that the right to stand aside was adopted only in the states of North Carolina, Pennsylvania and South Carolina. These are the only states in which the practice is known to have been followed. 24 *Cyclopedia of Law and Procedure*, "Juries," §13, C, p. 311-312 (1907); 17 *American and English Encyclopedia of Law*, 2 ed., §7, (6), p. 1190-1191 (1898). It is possible that the practice under 33 Edw. I, Stat. 4 was adopted by the various reception statutes or constitutional provisions enacted by the states in the 18th Century. (e.g. *Sealy* v. *State*, I Kelly 213 (Ga., 1846). However, there is no indication that the standing aside statute enjoyed general acceptance in the United States. This is illustrated by the reported argument of the Attorney General in *Commonwealth* v. *Dorsey*, 7 Browne 412, 103 Mass. Rpts. 412 at 416-47 (1869). After listing the 33 states and territories that provided by statute for peremptory challenges, the Attorney General then noted that the practice of standing aside jurors "has been said by some to be a part of the common law of this country; and it is adopted in South Carolina and perhaps

in others of the few states where the right is not conferred expressly by statute." In federal courts, the right to stand aside was recognized in *United States* v. *Marchant*, 12 Wheat. 479 (1827), but was limited to cases in which the local practice allowed it. *Marchant*, 12 Wheat. at 483; *United States* v. *Shackelford*, 18 How. 588 (1856); *Sawyer* v. *United States*, 202 U.S. 150 (1906). Therefore, evidence of general adoption of the right to stand aside is doubtful. Even where the right to stand aside was specifically recognized, the right was subject to the regulation of the trial court. In *State* v. *Benton*, 19 N.C. 188, 197 (1836), it was held that

> It may not be amiss to remark, that the practice of permitting the prosecuting officer to defer showing his cause of challenge to the excepted jurymen, until the panel be gone through, must be exercised under the supervision of the court, who will restrain it if applied to an unreasonable number.

Therefore, it is difficult to conclude that the right to stand aside as practiced in the United States after the adoption of the Constitution was the equivalent of a peremptory challenge for the prosecutor. In some situations, doubtless the right did amount to peremptory exclusion. But it is simply impossible to state that in all cases or that in all states that a prosecutor had the right to stand aside. From this, it follows that the right of the prosecution to challenge peremptorily was gained first by the statutes enacted by the Congress and by the various states.

As to peremptory challenges, the historical sources are more plentiful and, therefore, conclusions about the statutory grant of peremptory challenges to the prosecutor are more sure. *Commonwealth* v. *Dorsey*, 7 Browne 412, 103 Mass. Rpts. 412 (1869), provides a listing of the right to peremptory challenges of 33 states and territories. 103

Mass. Rpts. 416-417. Only three states were listed as providing the right to stand aside. 103 Mass. Rpts. at 417. From examination of this list and of the cases listed in 24 Cycl. of Law and Procdedure, "Juries," §C(11), p. 352-353 (1907); and 17 *Am and Eng. Encycl. of Law*, "Jury and Jury Trial," §5(b), p. 1178-1179; 1181 (1898), it seems evident that the majority of statutes granting peremptory challenges to defendants also granted peremptory challenges (usually fewer in number) to the prosecutor. Therefore, it is true that by 1870, the prosecutor in most states had a statutory right of peremptory challenge. *Swain* v. *Alabama*, 380 U.S. at 216. But this is not to say that the right of the prosecutor is at all comparable to that possessed by the defendant.

The historical right of the defendant to challenge jurors peremptorily has not been questioned in any of the literature tracing the development of peremptory challenge. Of course, the older case of *Stilson* v. *United States*, 250 U.S. 583, 586 (1919), baldly states that "there is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured." This statement must be read against the background of the proposed constitutional amendments at the first Congress which would have made the federal government the guarantor of the right to jury trial in the states and would have secured the right of challenge as it existed at the time.[3] James Madison proposed to substitute for the present jury trial clause (Article III, §2) a clause that would preserve the right of challenge. 2 Schwartz, *The Bill of Rights, A Documentary History*, p. 1027 (1971)

---

[3] Counsel for Petitioner does not have access to a copy of the Annals of Congress. Therefore, citations are taken from the source named in the body of the brief, which excerpt from the Annals.

(hereafter "*Schwartz*"). As an extension of the *Ex Post Facto* clause (Article I, §10), Madison proposed a third clause that "No state shall violate the equal rights of . . . trial by jury in criminal cases." 2 *Schwartz*, p. 1027. His argument was that the State governments were as likely to attack a citizen's rights as was national government. 2 *Schwartz*, at 1033. Neither the right to challenge nor the requirement that the states safeguard the right to jury trial were adopted. 2 *Schwartz*, p. 1123; 1154. Therefore, neither became a part of the Constitution. However, it is clear that at the time there was at least some demand for both provisions, especially the right of the defendant to challenge. Both Virginia and North Carolina recommended similar provisions as amendments to the Constitution. The Virginia provision reads

> 15th That, in criminal prosecutions, no man shall be restrained in the exercise of the usual and accustomed right of challenging or excepting to the jury. 2 *Schwartz*, p. 844.

North Carolina recommended

> 16. That, in criminal prosecutions, no man shall be restrained in the exercise of the usual and accustomed right of challenging or excepting to the jury. 2 *Schwartz*, p. 970.

From this short history, it may seem that the right of the defendant to challenge peremptorily in criminal cases has always been recognized and advocated. There is in this advocacy a realization that the defendant who faces the state in a criminal proceeding does not compete on terms of equality and, therefore, is entitled to consideration. Peremptory challenges along with challenges for cause serve to obtain a jury that is not biased and which makes the defendant feel comfortable, if that is possible. As is shown later in this brief, it is still the function of the

peremptory challenge to remove from the jury those persons whose impartiality is in doubt.

It may well be that the defendant's right to peremptory challenge will be denied protection by the due process clause of the Fourteenth Amendment when that issue is presented to the Court. *Duncan* v. *Louisiana*, 391 U.S. 145, 148-150 (1968). Some aspects of jury trial have been refused protection under this type of analysis [e.g. *Williams* v. *Florida*, 399 U.S. 78 (1970)]. However, it is unimportant in this case to determine whether the defendant is entitled to federal protection of his right to challenge jurors peremptorily. The essential conclusion to reach is that the statutory grant to a state prosecutor of a number of peremptory challenges is just that. There is no way in which to contort the Constitution or interpret history to make a federal constitutional right for the prosecutor to have peremptory challenges. Neither the Sixth nor the Fourteenth Amendment provide constitutional protection for a state. The grant of peremptory challenges to the prosecutor by the states is of relatively recent occurrence. Therefore, it must be concluded that the "right" of the prosecutor to strike peremptorily in non-existent. Rather, the prosecutor is allowed to make peremptory challenges as a matter of legislative grace. If the prosecutor misuses his privilege to deny a defendant a jury that reasonably represents the community, there can be no doubt that the prosecutor's privilege to challenge must be restricted. In *Duren* v. *Missouri*, 439 U.S. 357, 368 (1979), and *Taylor* v. *Louisiana*, 419 U.S. 522, 533-535 (1975), the court held then when the right to a jury drawn from a cross section of the community is shown to be denied, the state must justify its infringement of the right by demonstrating that the infringement serves a significant state interest. The same rule must apply in the present case. The privilege to challenge peremptorily is

not of sufficient importance or utility to allow its improper use to go unchecked and unreproved. The constitutional right to representative jury should not be abridged in favor of the exercise of a state statutory privilege.

(F) Remedy

To a large extent, the remedy to be applied in this and similar cases is suggested by two state court cases, *People* v. *Wheeler*, 148 Cal.Rptr. 890, 583 P.2d 748 (Cal., 1978), and *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979). These cases, relying on state constitutional grounds, held that the use by a prosecutor of peremptory challenges to remove prospective jurors solely on the ground of group bias, violates the right to a jury drawn from a representative cross-section of the community. *People* v. *Wheeler*, 583 P.2d at 762. The remedy fashioned may be described as follows. First, the prosecutor's presumption of rectitude is retained. *Commonwealth* v. *Soares*, 387 N.E.2d at 517; *People* v. *Wheeler*, 583 P.2d at 763. If the defendant claims that the prosecutor is using his allotment of peremptory challenges to exclude jurors on the basis of race, he must timely object and satisfy the trial judge that the use of peremptories is improper. *Wheeler*, 583 P.2d at 764. This is done by showing that the excluded jurors are members of a cognizable group within the meaning of the cross-section of the jury rule and that, under all circumstances known in the case, there is a "strong likelihood" that the jurors are being excluded "because of their group associations rather than any specific bias." *Wheeler*, 583 P.2d at 764. If the trial judge is convinced that the defendant has met his initial burden, the prosecutor must then go forward and show, again under the totality of circumstances, that his reasons for challenge were based on matters other than the race or other group association of the excluded jurors. "The show-

ing need not rise to the level of a challenge for cause." *Wheeler*, 583 P.2d at 764-765. If the prosecutor fails in his showing, then the entire panel or venire must be dismissed.

The proposed rule does no more than permit exploration of a claim that the agent of the state is misusing peremptory challenges to defeat a federally protected right. Under the existing precedents, inquiry is foreclosed. *Swain* v. *Alabama*, 380 U.S. 202, 223 (1965). It is by now apparent that the remedy created by the Supreme Court of California is no more than the application on a proper scale of Wigmore's "doctrine of chances." Examination of the equal protection cases like *Swain*, 380 U.S. 202 (1965), and earlier cases like *Smith* v. *Texas*, 311 U.S. 128 (1940), show that this method of evidentiary inference is common to this type of analysis. In *Swain*, the Court declined to examine the actions of a state prosecutor in any particular case, but did agree with petitioner in that case that systematic exclusion over a period of years by the same prosecutor would negate the presumption that the prosecutor was acting properly in any one case. 380 U.S. at 222-223; 227-228. In *Smith* v. *Texas*, the Court noted that the Texas scheme for jury selection was not unfair on its face and that it could be used fairly. 311 U.S. at 130. The jury commissioners testified that they did not discriminate against blacks in the selection of the jury. 311 U.S. at 131. However, the Court reversed the conviction holding that

> Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service. Nor could chance and accident have been responsible for the combination of circumstances under which a negro's name, when listed at

> all, almost invariably appeared as number 16, and under which number 16 was never called for service unless it proved impossible to obtain the required jurors from the first 15 names on the list. 311 U.S. at 131.

This line of argument clearly parallels the explanation of the "doctrine of chances" set out in II Wigmore, Evidence, §302, "Theory of Evidencing Intent," p. 241-247 (Chadbourne Rev. 1979):

> The argument here is purely from the point of view of the doctrine of chances—the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all.

The author goes on to explain that

> It is not here necessary to look for a general scheme or to discover a united system in all the acts; the attempt is merely to discover the intent accompanying the act in question; and the prior doing of similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent. The argument is based purely on the doctrine of chances, and it is the mere repetition of instances, and not their system or scheme, that satisfies our logical demand. II, Wigmore, §302, p. 245.

Therefore, the repetition of similar events permits the inference that the acts are not done with innocent intent. This rule was recognized in substance, if not by name, by the Supreme Court of California in its *Wheeler* case. In that case, the intricate statistical models developed over the past few years were rejected and "more traditional procedures" were employed. *People* v. *Wheeler*, 583 P.2d at 763-764. That court first recommended the creation of the best record possible and demanded proof that the persons

excluded were members of a group cognizable within the representative cross-section rule. After these preliminaries, the accused was required, from all the circumstances of the case, to

> . . . show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias. 148 Cal. Rptr. 905; 583 P.2d 764.

Under this rule, the accused may show the likelihood of bad intent, in the first instance, by showing that the prosecutor has struck all or most members of a group or that he has used a disproportionate number of challenges against the group and that the only shared characteristic of the challenged jurors is their membership in the group. 583 P.2d at 764. It is obvious that the California court recognized the effect of the doctrine of chances. The difference between the rule set out in *Wheeler* and that set out in *Swain* is nothing more than a difference in scale. *Swain* required similar acts by the prosecutor year after year to evidence his bad intent. *Wheeler* adopts the more reasonable view that intent can be discerned from the acts of the prosecutor in a single proceeding. Of the two cases, *Wheeler* more correctly applies the doctrine of chances because it does not require more than a showing of repeated similar acts while *Swain* requires a showing of ". . . the prosecutor's systematic use of peremptory challenges against Negroes over a period of time." 380 U.S. at 227. The Court should require no more stringent showing of improper challenges than that required by *Wheeler*.

There can be no fair objection to the rule set out in *Wheeler* and proposed for acceptance by this Court. Surely, the evidentiary rule set out in *Wheeler* should be capable of administration by state trial judges. These judges see the same principle used often in the trial-in-

chief of criminal cases to establish the guilty intent of the defendant. The matter is largely left to their discretion during the trial-in-chief. There is no reason to distrust their competence to handle the rule before trial.[4] Nor may the prosecutor fairly complain about limitations to his peremptory challenges under the rule. It is unlikely that the prosecutor will be called on to explain his challenges if he strikes one or two black jurors from a panel of twenty-five or thirty. Barring the existence of some other circumstances, the doctrine of chances would not give rise to an inference of discriminatory intent. However, as the prosecutor strikes more black people peremptorily, the only reasonable conclusion would be that he or she is doing so to remove all blacks from the panel. This conclusion would be confirmed or dissipated by the other circumstances present in the case. If a reasonable suspicion of bad intent is created, then the prosecutor should be called to account. The proposed remedy only permits the defendant to question questionable acts, it does not guarantee him a new jury panel every time an objection is made. Rather, it allows the defendant to object when the prosecutor uses a state-created privilege to remove a recognizable group from the jury and thus deny him the constitutionally required benefit of a jury composed of person with varied experiences and backgrounds. *Peters* v. *Kiff*, 407 U.S. 493, 503-504 (1972); *Taylor* v. *Louisiana*, 419 U.S. 522, 527-528 (1975). For these reasons, no valid objection can be made to the proposed remedy.

As shown by the experiences of California, the rule is not unworkable nor does it unduly embarrass the prosecutor in the use of his peremptory challenges. In *People*

---

[4] Presumably, federal judges could operate under the rule as well. Fed. R. Ev. 404(b)

v. *Hall*, 197 Cal.Rptr. 71, 672 P.2d 854 (1983), the California Supreme Court expressed its satisfaction with the rule and noted that no empirical evidence had been adduced to sustain criticism of the rule. *People* v. *Hall*, 197 Cal.Rptr. at 76; 672 P.2d at 859. The chief complaint leveled at the rule is that the peremptory challenges of the prosecutor are somehow not really peremptory any more. But, as shown in Section D of this brief, the prosecutor's "right" to peremptory challenges is instead a privilege granted by the legislature. The privilege of peremptory challenge is quite properly subordinated to the acknowledged right of the defendant to face a jury reasonably representative of the community. No court should stand by idly and observe an agent of the state act in a manner that gives the appearance of intentional discrimination against a particular group. Justice must satisfy the appearance of justice. *In Re Murchison*, 349 U.S. 133, 136 (1955). It is senseless to obtain a jury panel that approximates a cross section of a community only to allow the prosecutor by means of his peremptory challenges to diminish or destroy that cross section. *McCray* v. *New York*, 461 U.S. 961, 968 (1983), Marshall, J., dissent from denial of certiorari. The effect of a prosecutor seen by the public removing all blacks from a jury panel cannot be underestimated. The trial judge who sits by while all blacks who survived challenge for cause are dismissed from the panel and sent back to the jury pool must also be looked at askance by the defendant, the witnesses and the public, but in most jurisdictions, he is powerless to intervene. Such scenes in courtrooms cannot but breed disrespect for the law and its administration. Therefore, the claim that the prosecutor has a right to unfettered peremptory challenge must simply be denied. Too much harm can arise from irresponsible, discriminatory use of such challenges.

Another complaint about the proposed rule is that the prosecutor may not be able to state a sufficient reason to justify his use of the peremptory challenges. *People* v. *Hall*, 197 Cal.Rptr. at 77; 672 P.2d at 859. The simple answer to this contention lies in the operation of the rule. The prosecutor need not explain his actions until they give rise to a substantial suspicion, under all the circumstances of the case, that he is behaving improperly. The trial judge, naturally, will have observed the persons who are struck by the prosecutor. For example, if there is no common trait among these persons other than their race, then an explanation should be made. If the prosecutor is unable to articulate some reason sufficient to meet his relaxed burden, then under the doctrine of chances, it is only just to conclude that there is no reason for the challenges other than race discrimination.

A third objection to the rule is that it may further complicate and lengthen criminal trials that are already too long and complicated. *United States* v. *Clark*, 737 U.S. 679, 682 (7 Cir., 1984). As compared to the time that a hearing on a motion required by *Swain* with its attendant statistical evidence and witnesses would take the proceeding advocated here will mark a major simplification in the law. No proceedings will be had until the defendant convinces the trial judge that something is amiss. Then, and only then, will the prosecutor have to articulate his reasons. The trial judge who will have observed the voir dire and noticed who was struck can then make his decision. This purported objection is groundless.

The most attractive objection to the proposed rule is that which contends that any restriction of the prosecutor's right of peremptory challenge will necessarily hobble his voir dire which will in turn impair his oppor-

tunity to challenge for cause. This theme was first mentioned in *Swain* v. *Alabama*, 380 U.S. at 220-222. It was picked up in an article by Professor Barbara Babcock who stated that the peremptory challenge serves "as a shield for the exercise of the challenge for cause." 27 Stanford Law Review 545, "Voir Dire: Preserving Its Wonderful Power," at 554-555 (1975). Babcock acknowledged that vigorous questioning in an attempt to challenge for cause could well result in unexpressed anger and bias on the part of the juror questioned. Of course, a peremptory challenge can prevent that juror from sitting on the jury if the challenge for cause is denied. However, striking that juror would not give rise to a claim of improper use in the first place. Assuming that such a claim was made, the possible bias of the prospective juror should more than adequately explain why this particular juror should be excused. This objection lacks substance. An individual peremptory challenge will not be examined unless the overall pattern and number of challenges raises the probability of improper intent. Therefore, the objection should not prevent adoption of the proposed rule.

A last objection that could be raised is one asking whether the Court should adopt this rule as a matter of federal constitutional law. Members of the Court have in the recent past expressed a preference for this matter to be resolved in state courts. *McCray* v. *New York*, 461 U.S. 961, 962-963 (1983), Opinion of Stevens, J., on denial of certiorari. And there is an unmistakable inference to be made from the Court's opinions in *Oregon* v. *Haas*, 420 U.S. 714 (1975), and *Pruneyard Shopping Center* v. *Robbins*, 447 U.S. 74 (1980), that the Court will allow states wide latitude in solving, under their own constitutions, problems like the one presented here. However, the states have failed to take any action. As shown by the Appendix to the Petition for Certiorari, only four states out of the

twenty-five that have considered the problem of improper challenges, have devised new rules. Appendix to Petition for Certiorari, p. 19-20. Since the Petition was filed, the courts of Arizona and of New Jersey have considered the issue. In *State* v. *Wiley*, 698 P.2d 1244, 1255 (Ariz., 1985), the Supreme Court of Arizona refused to relinquish its allegiance to the *Swain* rule. The Appellate Division of the New Jersey Superior Court, in *State* v. *Gilmore*, 199 N.J. Super. 389, 489 A.2d 1175 (1985), essentially adopted the *Wheeler* rule on the basis of the New Jersey state constitution. Essentially, the number of jurisdictions following either *Swain* or *Wheeler* has not changed. Nor does it seem likely to. *People* v. *Nurse*, 475 N.E.2d 1000 (Ill. App. 1 Dist., 1985). Therefore, the duty to declare the law falls to this Court, which is the one legal and moral authority created by the Constitution to ensure the rights of the people. The Court must act on this problem and must grant the relief here prayed for.

(G) Application To The Present Case And Conclusion

In this case, 45 potential jurors were brought to the courtroom for examination and service at the trial of James Batson. Eight (8) were challenged and excused for cause (Tr, p. 119-120). On behalf of the Commonwealth of Kentucky, the Assistant Commonwealth Attorney exercised all of his peremptory challenges. He struck four black persons and two white persons. (App., p. 3). The swearing of the jury was objected to and a new panel of jurors was requested (App., p. 3-4). However, the trial judge overruled both motions, and the trial took place in front of an all white jury (App., p. 3-4). The application of the remedy proposed here is obvious. A disproportionate number of peremptory challenges were expended by the prosecutor to remove all blacks from the jury. *People* v. *Wheeler*, 148 Cal. Rptr. at 905; 583 P.2d at 764. Four of the prosecutor's six peremptory challenges were exercised to remove all black people from the jury. This certainly is sufficient showing of a strong likelihood that the strikes were used with the intention to remove all blacks from the jury because they were black. At the very least, Petitioner should have been afforded a hearing on his claim and the Assistant Commonwealth Attorney should have been required to state the reasons for his challenges. Of course, the trial court did not follow this procedure, but simply overruled the objection and motion. Ordinarily, the proper relief in these circumstances might be to vacate the judgment and remand for hearing. However, the Court must keep in mind that the trial of this case occurred in February, 1984 (App., p. 1). Over sixteen months have elapsed since the day of trial. It seems unlikely that the prosecutor would be able to recall at this late date the reason why he exercised peremptory challenges in what was then a relatively unimportant burglary case. Therefore, remand for hearing would send the

case back without assurance that the prosecutor could remember at all the reasons why he exercised his challenges or whether his memory would be accurate. Therefore, the Court is urged to reverse the Opinion of the Supreme Court of Kentucky in this case and to remand with directions to grant Petitioner a new trial.

J. DAVID NIEHAUS
Deputy Appellate Defender of the
Jefferson District Public Defender
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
(505) 587-3800
Counsel for Petitioner

FRANK W. HEFT, JR.
Chief Appellate Defender of the
Jefferson District Public Defender
Co-Counsel for Petitioner

DANIEL T. GOYETTE
Jefferson District Public Defender
Of Counsel

No. 84-6263

Supreme Court, U.S.
FILED
MAR 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JAMES KIRKLAND BATSON . . . **Petitioner**

versus

COMMONWEALTH OF KENTUCKY - **Respondent**

BRIEF FOR RESPONDENT

DAVID L. ARMSTRONG
Attorney General of Kentucky

By: CARL T. MILLER, JR.
Assistant Attorney General
Counsel for Respondent

RICKIE L. PEARSON
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601-3494
(502) 564-7600
Co-Counsel for Respondent

WESTERFIELD-GOULTY CO., 640 W. KENTUCKY—P.O. BOX 5031, LOUISVILLE, KY.

BEST AVAILABLE COPY

3 H 1 P

I.

QUESTION PRESENTED

Is a trial court compelled by the Constitution to restrict the use of peremptory challenges by counsel in a particular case when members of an identifiable group are excluded from the jury panel?

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Contents	ii
Table of Authorities	iii- v
Summary or Argument	1- 3
Argument	3–26
A. Petitioner Failed to Present Proof in the Trial Court Regarding His Alleged Constitutional Violation	3- 6
B. The Effect of Peremptory Challenges is Not Confined to the Selection of a Jury, But Impacts the Entire Criminal Trial	6–14
C. The "Remedy" Proposed by Petitioner Will Serve Only as an Undue Strain on the Judicial Process with Little Recognizable Benefit	14–26
D. Justice is Better Served by the *Swain* Rule Than by the Proposed Rule	26
Conclusion	27

TABLE OF AUTHORITIES

Cases: PAGE

Apodaca v. *Oregon*, 406 U. S. 404 (1972) 13
Brown v. *Louisiana*, 447 U. S. 323 (1980) 13
Commonwealth v. *McFerron*, Ky., 680 S. W. 2d 924 (1984) 4
Commonwealth v. *Henderson*, 438 A. 2d 951 (Pa. 1981) 14
Commonwealth v. *Soares*, 387 N. E. 2d 499 (Mass. 1979), *cert. denied*, 444 U. S. 881 (1979) 4, 14, 25
Doepel v. *United States*, 434 A. 2d 449 (D.C. App. 1981), *cert. den.*, 454 U. S. 1037 (1981) 14
Evitts v. *Lucey*, 105 S. Ct. 830 (1985)..... 11
Hayes v. *Missouri*, 120 U. S. 68 (1887) 12
Herring v. *New York*, 422 U. S. 853 (1975) 11
Holley v. *J. & S. Sweeping Co.*, 192 Cal. Rptr. 74 (Cal. Ct. App. 1983) 17, 23
Johnson v. *Louisiana*, 406 U. S. 356 (1972) 13
Lewis v. *United States*, 146 U. S. 370 (1892) 25
McCray v. *Abrams*, 750 F. 2d 1113 (Cir. 1984), Pet. for Cert. filed, No. 84-1426 (March 4, 1984) 14
People v. *Alexander*, 205 Cal. Rptr. 387 (Cal. Ct. App. 1984) 18
People v. *Fuller*, 185 Cal. Rptr. 283 (App. 1982).. 18
People v. *Hall*, 672 P. 2d 859 (Cal. 1983) 18
People v. *Harvey*, 208 Cal. Rptr. 910 (Cal. Ct. App. 1984) 18
People v. *Johnson*, 583 P. 2d 774 (Cal. 1978) 21
People v. *McCray*, 443 N. E. 2d 915 (N.Y. 1982) *cert. denied* 461 U. S. 961 (1983) 14, 22, 24
People v. *Payne*, 457 N. E. 2d 1202 (Ill. 1983) 6, 14
People v. *Rousseau*, 179 Cal. Rptr. 892 (Cal. Ct. App. 1982) 18
People v. *Walker*, 205 Cal. Rptr. 778 (Cal. Ct. App. 1984) 18
People v. *Wheeler*, 583 P. 2d 748 (Cal. 1978) .....passim

PAGE

Peters v. *Kiff*, 407 U. S. 493 (1946) 19
Pointer v. *United States*, 151 U. S. 396 (1894) 7
Roman v. *Abrams*, 608 F. Supp. 629 (D.C. N.Y. 1985) 24
State v. *Crespin*, 612 P. 2d 716 (N.M. Ct. App. 1980) 14
State v. *Gilmore*, 489 A. 2d 1175 (N.J. Super. Ct. App. Div. 1985) 14
State v. *Neil*, 457 So. 2d 481 (Fla. 1984) 14
State v. *Raymond*, 446 A. 2d 743 (R.I. 1982) 14
State v. *Stewart*, 591 P. 2d 166 (Kan. 1979) 14
Swain v. *Alabama*, 380 U. S. 202 (1965) .....passim
Taylor v. *Louisiana*, 419 U. S. 522 (1975) .....passim
United States v. *Cancel*, 708 F. 2d 894 (3rd Cir. 1983), *cert. den.*, ___ U. S. ___, 104 S. Ct. 165, 78 L. Ed. 2d 151 (1983) 15
United States v. *Childress*, 715 F. 2d 1313 (8th Cir. 1983) (en banc), *cert. den.*, ___ U. S. ___, 104 S. Ct. 744, 79 L. Ed. 2d 202 (1984) 14
United States v. *Gouveia*, ___ U. S. ___, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984) 12
United States v. *Jenkins*, 701 F. 2d 850 (10th Cir. 1983) 15
United States v. *Leslie*, 759 F. 2d 366, *reh.* en banc granted, 759 F. 2d 366 (5th Cir. 1985) 14–15
United States v. *Mandujano*, 425 U. S. 564 (1976). 12
United States v. *Whitfield*, 715 F. 2d 145 (4th Cir. 1983) 14
Weathersby v. *Morris*, 708 F. 2d 1493 (9th Cir. 1983), *cert. den.*, ___ U. S. ___, 104 S. Ct. 719, 79 L. Ed. 2d 181 (1984) 15
Wendling v. *Commonwealth*, 143 Ky. 587, 137 S. W. 205 (1911) 12–13
Willis v. *Zant*, 720 F. 2d 1212 (11th Cir. 1983), *cert. den.*, ___ U. S. ___, 104 S. Ct. 3546, 82 L. Ed. 2d 849 (1984) 14

Constitutional Provisions: PAGE

U. S. Constitution Fifth Amendment .....passim
U. S. Constitution Sixth Amendment .....passim
U. S. Constitution Fourteenth Amendment .....passim
Ky. Const. § 7 12
Puerto Rico Const. Art. 2, § 11 13
Oregon Const. Art. 1, § 11 13
La. Const. Art. 1, § 17 13
Utah Const. Art. 1, § 10 13

Statutes:

Florida Stat. Annot., § 913.10 .....13, 25

Miscellaneous:

Ky. Rules of Crim. Proc. 9.40 3
Louisiana Code Crim. Proc. 782 13
50 C.J.S. *Juries* § 267 20
Black's Law Dictionary (5th Ed. 1979) 20
Note, *People* v. *Payne and the Prosecution's Peremptory Challenges: Will They Be Preempted,* 32 DePaul Law Review 399 (1983) 6, 8, 22
Younger, *Unlawful Peremptory Challenges,* 7 Litigation 23 (Fall 1980) 22, 26
Comment, *Is There a Place for the Challenge of Racially-based Peremptory Challenges?,* 1984 Det. C. L. Rev. 703 (1984) 22
Note; *Peremptory Challenges and the Meaning of Jury Representation,* 89 Yale L. J. 1177 (1980).. 22
Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md. L. Rev. 337 (1982) 16, 22

IN THE

SUPREME COURT OF THE UNITED STATES

No. 84-6263

October Term, 1984

JAMES KIRKLAND BATSON - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

BRIEF FOR RESPONDENT

SUMMARY OF ARGUMENT

The use of peremptory challenges affects every criminal jury trial in America. Under the American adversary system, peremptory challenges are of great importance in affording the parties the confidence that the case will be heard by an impartial jury. Not only is it the function of the challenge to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide it on the basis of the evidence presented before them, and not otherwise. Peremptories are an integral part of the mechanism for choosing an impartial jury, just as is voir dire and the exercise of challenges for cause. Peremptory challenges should continue to be allotted to the prosecution and the defense.

In *Swain* v. *Alabama,* 380 U. S. 202 (1965) this Court held that it was not a violation of the Fourteenth

Amendment for the prosecutor to use his peremptory challenges to strike petit jury veniremen who are members of an identifiable group absent proof by the defendant that the prosecutor has done the same in previous cases over a period of time. Furthermore, the prosecutor's exercise of peremptories is presumed to be impartial and he need not give reasons for excusing the veniremen of an identifiable group.

Subsequent to *Swain*, this Court held that under the Sixth Amendment's guarantee of a jury trial in criminal prosecutions, petit juries need not mirror the community and reflect the various distinctive groups in the population. Therefore, a defendant is not entitled to a jury of any particular composition, but the jury wheels, pools of names, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof. *Taylor* v. *Louisiana*, 419 U. S. 522 (1975). Kentucky submits these holdings are constitutionally sound and should be reaffirmed.

Petitioner's proposed remedy is a variation of the one adopted by California's highest court in *People* v. *Wheeler*, 583 P. 2d 748 (Cal. 1978), a criminal case decided pursuant to that state's constitution. *Wheeler* requires, when an objection is made, that the opposing side explain those peremptories used to exclude all or most of a readily identifiable group from the petit jury. Petitioner's variation is that only the prosecution must explain its challenges. This inequitable remedy is not consistent with the Equal Protection Clause of the Fourteenth Amendment and does not perpetuate jus-

tice or the appearance of such. Thus, the rule in *Swain* is based on equal protection considerations and presents a fair or equitable resolution in cases where the allegation is made that peremptory challenges are being exercised on the basis of group affiliation.

ARGUMENT

A. Petitioner Failed to Present Proof in the Trial Court Regarding His Alleged Constitutional Violation.

The facts demonstrate that the prosecutor used four of his six allotted peremptory challenges to strike the only four black persons on the venire.[1] The sum of petitioner's proof was that the prosecutor acknowledged and stated, "I struck four blacks and two whites" and "looking at them, yes; it's an all white jury" (TE 7-8; A 3). From this factual acknowledgement, petitioner presumed that the prosecutor struck the veniremen because of race discrimination. Petitioner's trial counsel failed to question the prosecutor or put any evidence on the trial record that the prosecutor had participated in striking affiliated groups, like the one at bar, in any other case. *Swain* at 224,

---

[1]In Kentucky, the prosecution is entitled to five (5) peremptory challenges and the defendants jointly to eight (8) peremptory challenges. If one or two alternate jurors are chosen the number of peremptory challenges allowed each side shall be increased by one. If more than one defendant is being tried, the court may at its discretion allow additional peremptory challenges to each defendant. *Kentucky Rules of Crim. Proc.* 9.40. In the case at bar, the prosecutor was allowed six (6) peremptory challenges. The defense was allowed nine (9) to provide for an alternate who would be removed from the jury when the case was submitted.

227, 228. Consequently, petitioner's trial counsel failed to rebut the presumption of impartiality which was created when the prosecutor exercised his peremptory challenges. *Id.* at 222.

In petitioner's appeal to the Kentucky Supreme Court, his conviction in the circuit court was affirmed by a memorandum opinion which, in disposing of the jury issue, stated the following:

> "Appellant next contends that it was error to permit the prosecuting attorney to exercise peremptory challenges to all the blacks who were called as jurors in the case. Appellant acknowledged that the United States Supreme Court in *Swain* v. *Alabama*, 380 U. S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), held that peremptory challenges against blacks, by themselves, do not violate the Fourteenth Amendment Equal Protection Clause. However, appellant urges this Court to adopt the position of other states based upon the Sixth Amendment and their own state constitutions, that peremptory challenges against minority groups can be unconstitutional if they were shown to be a pattern of challenges against jurors from a discrete group in a likelihood that the challenges were based solely on group membership. *People* v. *Wheeler*, 583 P. 2d 748 (Cal. 1978), and *Commonwealth* v. *Soares*, 387 N.E. 2d 499 (Mass. 1979). We have recently affirmed our reliance upon Swain in *Commonwealth* v. *McFerron*, Ky., 680 S. W. 2d 924 (1984), holding that an allegation of the lack of a fair cross-sectional jury which does not concern a systematic exclusion from the jury drum does not rise to constitutional proportions, and we decline to adopt another rule." (A. at 8).

In dealing with petitioner's appeal, the Supreme Court of Kentucky acted with due deference to this Court's decision in *Swain* v. *Alabama*, and *Taylor* v. *Louisiana*, regarding the equal protection claim and the fair cross-section of the community requirement. As a result, the requirements of both the Fourteenth Amendment and Sixth Amendments were met in petitioner's case under the latest pronouncements of this Court.

Petitioner contends there is a constitutional necessity under the Sixth and Fourteenth Amendments for this Court to create a new rule that the prosecutor shall not have peremptory challenges in the traditional sense —unquestioned and unexplained—which would allow him to remove groups of people from the jury panel in a particular case. We submit that there is no such constitutional necessity and that, as stated in *Taylor* v. *Louisiana*, "defendants are not entitled to a jury of any particular composition. . . ." 419 U. S. at 538. *Taylor* and its progeny dealt only with state administered selection procedures which exclude groups from the jury venires, not from the petit jury:

> "Thus, in contrast to the Supreme Court's test for purposeful systematic exclusion under the Fourteenth Amendment, the Sixth Amendment cross-sectional analysis has been limited to the venire composition. Under both the Fourteenth and Sixth Amendments, group affiliation appears to be only a means by which a court identifies the scope of the community's participation in the jury system. According to *Swain* and *Taylor*, the constitutional requirement of community participation

> under either the Fourteenth or Sixth Amendment is satisfied when the venire represents a cross-section of the community, and when groups are not excluded systematically from the petit jury.
>
> *Swain* authorized judicial review when systematic exclusion occurred in case after case." Note, *People* v. *Payne* and the Prosecution's Peremptory Challenges: Will they be Preempted? 32 DePaul L. Rev., 399, 416-417 (1983).

Petitioner makes no claim of systematic exclusion of blacks on a case-after-case basis. There is no information in the record relating to any case other than his.[2] Kentucky contends that the *Swain* rule should survive petitioner's attack and prosecutors should continue to be allowed to exercise peremptory challenges without question, explanation or judicial scrutiny.

Other than petitioner's claim regarding petit jury composition, he fails to allege and demonstrate that the jury ultimately selected was partial or prejudiced. Absent petitioner's unproven allegation of discrimination, the record does not illustrate that petitioner's trial was unfairly conducted or its result was unreliable because the jurors were not impartial.

B. The Effect of Peremptory Challenges Is Not Confined to the Selection of a Jury, But Impacts the Entire Criminal Trial.

The elimination or qualified use of the peremptory challenges tugs at the very fiber of a criminal trial,

---

[2]By contrast the Court in *Swain* had information that "no negro had actually served on a petit jury since about 1950." *Swain*, at 205.

that is, the existence of an impartial jury to hear the case. As set forth below, peremptories are essential to the overall criminal process.

1. The Importance of Peremptory Challenges.

In *Swain* v. *Alabama*, 380 U. S. 202 (1965), this Court examined the common law history, nature and function of the peremptory challenge. The conclusion was that it is "one of the most important of the rights secured to the accused." *Id.* at 219 (quoting *Pointer* v. *United States*, 151 U. S. 396, 408 (1894)). Although this Court held that peremptory challenges were not constitutionally required, *Id.* at 219-220, it added that:

> "[A]lthough historically the incidents of the prosecutors challenge has differed from that of the accused, the view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be even[ly] held.'" *Id.* at 220.

The importance of the peremptory challenge has been stated as follows:

> "In formulating its standard in *Swain*, the Supreme Court recognized that to achieve the underlying purpose of peremptory challenges, they must be exercised without reason and without subjection to the court's control or inquiry. (Footnote omitted). Peremptory challenges, according to *Swain*, were important in achieving an impartial jury because they enabled a party to excuse pro-

spective jurors on the basis of either a real or imagined subjective perception of bias which ordinarily could not be established during voir dire. The *Swain* court noted that these perceptions frequently were based on considerations such as juror appearance or demeanor, and characteristics such as religion, occupation, race and socio-economic background. (Footnote omitted). The court noted that permitting judicial inquiry into the reason for exercising a peremptory challenge would radically alter the function and nature of the device. (Footnote omitted). Therefore, even though an individual prosecutor exercised his challenges to shape the racial composition of a single petit jury, his peremptory challenges were not subject to the requirements of equal protection. (Footnote omitted).

Swain thus demonstrated the court's fear that opening the peremptory challenge to attack would undermine its function. The court's endorsement of the peremptory acknowledged that racial factors were legitimate trial-related basis for exercising the peremptory challenge. (Footnote omitted). Furthermore, Swain recognized the impossibility of applying a traditional systematic exclusion analysis to the small number of individuals presented on the venire within a particular trial. (Footnote omitted)." 32 Depaul L. Rev. 399, 403, 404 (1983).

Despite occasional complaints from the defense bar, special interest groups and legal theorists seeking perfection in adjudicatory process, nothing has happened in the last twenty years to show that the decision in

Swain does not best serve the interests of a fair trial or that a better rule for the use of peremptories can be devised.[2]

2. Trial by Jury.

In *Swain* this Court recognized two different scenarios for use of peremptory challenges. The first involved the use of group characteristics as a means of identifying probable prejudice in a particular case. This Court concluded such usage was proper and a traditional part of the jury system as known to the common law and American jurisprudence. The second scenario, which this Court would find improper if proven, concerned the prosecutor's use of peremptories in multiple cases which shows a pattern of systematically excluding identifiable groups.

So deeply ingrained in the jury system is the peremptory challenge that the dissenters in *Swain* found no fault with the majority's holding that peremptory challenges used on a racial basis in a particular case were not improper. Justice Goldberg joined by Chief Justice Warren and Justice Douglas dissented, stating the following:

> "The holding called for by this case is that where as here, a negro defendant proves that negroes

---

[2]One of the amicus briefs suggests that when a minority person is struck from the petit jury "he or she should be replaced by a member of the same group." Brief for Amici Curae of NAACP Legal Defense and Educational Fund, Inc., The American Jewish Committee, and The American Juris Congress, at 51. This proposal places more importance upon achieving a mirror image of the community than an impartial jury.

constitute a substantial segment of the population, that negroes are qualified to serve as jurors, and that none or only a token has served on juries over an extended period of time, a prima facie case of the exclusion of negroes from juries is then made out; . . . and that the state wholly fails to meet the prima facie case of systematic and purposeful racial discrimination by showing that it has been accomplished by the use of a peremptory challenge system unless the state also shows that it is not involved in the misuse of such a system to *prevent* all negroes from ever sitting on *any jury*. Such a holding would not interfere with the rights of defendants to use peremptory challenges, nor the *right of the state to use peremptories as they normally and traditionally have been used*. It would not mean . . . that negroes are entitled to proportionate representation on a jury. . . . Nor would it mean that where systematic exclusion of negroes from jury service has not been shown, a prosecutor's motives are subject to question or judicial inquiry when he excludes negroes or any other group from sitting on a jury *in a particular case. Only where systematic exclusion has been shown*, would the state be called upon to justify its use of peremptories or to negative the state's involvement in discriminatory jury selection." (Emphasis added; *Swain* at 244-245).

It is obvious that the *Swain* Court was unanimous in its opinion and also agreed that a prosecutor's use of peremptories in any particular case should not be examined. The dissenters differed with the majority only in that they thought that the facts educed in the

record as to repetitive practices in the jurisdiction made a prima facie case of systematic exclusion of negroes from serving on any jury. We believe the dissenters in *Swain* would agree with our position that there is no constitutional violation when the prosecution uses peremptories as a traditional part of the jury system. Additionally, there is nothing in the record in this case to show that the prosecution's use of challenges were contra to traditional jurisprudence usage. Such an issue has not been raised in the matter at bar.

3. Adversary System.

Petitioner argues at length that the prosecutor does not have a "right" to peremptory challenge. He extends this conclusion for the purpose of further arguing that only the prosecution should explain the use of the peremptory challenges when an allegation has been made by the defense that the prosecution has exercised its peremptory challenges because of bias. Such an approach to resolve the question at bar is contrary to all notions of fair play and justice.

The adversary system has been adulated in many opinions of this Court and attributed directly to the Bill of Rights. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objectives that the guilty be convicted and the innocent go free." *Evitts* v. *Lucey*, ___ U. S. ___, 105 S. Ct. 830 (1985) quoting from *Herring* v. *New York*, 422 U. S. 853 (1975). The system is especially cher-

ished when compared with the inquisitorial system recognized in some countries.[4] One of the chief features of the adversary system is that "the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'" *Swain* v. *Alabama*, 380 U. S. 202, at 220, quoting *Hayes* v. *Missouri*, 120 U. S. 68, 70 (1887). One of the details of the system is that the prosecution and the defense shall have peremptory challenges "exercised without a reason stated, without inquiry and without being subjected to the court's control." *Id.*

4. Unanimous Verdict.

Section 7 of Kentucky's Constitution provides:

> "Trial by jury inviolate.
> The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this constitution."

By looking to the common law, the highest court of Kentucky interpreted this constitutional provision to mean that an accused in a criminal or penal case has the right to a trial in a court of justice presided over by a judge, trial before a jury of twelve men, and that all of them shall agree upon the verdict. *Wend-*

---

[4] *United States* v. *Gouveia*, ___ U. S. ___, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984); *United States* v. *Mandujano*, 425 U. S. 564 (1976).

ling v. *Commonwealth*, 137 S. W. 205, 207 (Ky. 1911). Only three jurisdictions in the United States differ from Kentucky in requiring a unanimous verdict to convict or acquit in a criminal case.[5]

Two states differ from Kentucky in authorizing juries of less than twelve members in all criminal cases, but those states require a unanimous verdict of twelve persons to convict or acquit in a case involving a capital offense.[6]

Peremptory challenges or strikes are of more importance in a justice system which requires a unanimous verdict to convict. These challenges, which vary from state to state, are indispensible in reducing the number of veniremen to the required number of twelve impartial jurors.

Without the benefit of the prosecutions peremptories, the balance between the initial selection of the venire from a representative cross-section of the com-

---

[5]Puerto Rico allows a verdict reached by nine of twelve jurors. Const. Art. 2, §11. Oregon requires ten of twelve jurors to convict or acquit for all criminal trial offenses with the exception of a unanimous verdict for a conviction of first degree murder. Const. Art. 1, §11; upheld in *Apodaca* v. *Oregon*, 406 U. S. 404 (1972). In Louisiana ten of twelve jurors are required to convict or acquit in all lesser cases; Const. Art. I § 17; La. Code Crim. Proc. 782; *Johnson* v. *Louisiana*, 406 U. S. 356 (1972; *Brown* v. *Louisiana;* 447 U. S. 323 (1980).

[6]Utah requires an eight person jury to reach a unanimous verdict in all criminal cases except cases involving a capital offense when a jury of twelve members and a unanimous verdict is required. Const. Art. 1, § 10. Florida requires the unanimous verdict of twelve jurors to convict or acquit in a case involving a capital offense. A unanimous verdict by six jurors is required in all other criminal jury trials. Florida Stat. Annot., § 913.10.

munity and the ultimate selection of an impartial jury cannot be struck. Consequently, the absence of an impartial jury would all but eliminate the possibility of a unanimous verdict.

C. The "Remedy" Proposed by Petitioner Will Serve Only as an Undue Strain on the Judicial Process with Little Recognizable Benefit.

Petitioner urges this Court to adopt the rule of peremptory challenge validity created by the California Supreme Court in *People* v. *Wheeler*, 583 P. 2d 748 (Cal. 1978), a rule expressly rejected by several jurisdictions but imitated by others.[7] The *Wheeler* rule

---

[7]The Wheeler rule was rejected by the highest appellate courts of Illinois, Kansas, Kentucky, New York, Pennsylvania, Rhode Island, and the District of Columbia, *People* v. *Payne*, 457 N. E. 2d 1202 (Ill. 1983), *State* v. *Stewart*, 591 P. 2d 166 (Kan. 1979), *Batson* v. *Commonwealth*, A. at p. 5, *People* v. *McCray*, 443 N. E. 2d 915 (N.Y. 1982), *cert. den.*, 461 U. S. 961 (1983), *Commonwealth* v. *Henderson*, 438 A. 2d 951 (Pa. 1981), *State* v. *Raymond*, 446 A. 2d 743 (R.I. 1982), *Doepel* v. *United States*, 434 A. 2d 449 (D.C. App. 1981), *cert. den.*, 454 U. S. 1037 (1981). *Wheeler* was adopted by Florida, Massachusetts, New Jersey, and New Mexico. *State* v. *Neil*, 457 So. 2d 481 (Fla. 1984), *Commonwealth* v. *Soares*, 387 N. E. 2d 499 (Mass. 1979), *cert. den.*, 444 U. S. 881 (1979), *State* v. *Gilmore*, 489 A. 2d 1175 (N.J. Super. Ct. App. Div. 1985), *State* v. *Crespin*, 612 P. 2d 716 (N.M. Ct. App. 1980). Among the federal circuit courts, versions of the *Wheeler* rule were judged unacceptable by three circuits. See *Willis* v. *Zant*, 720 F. 2d 1212 (11th Cir. 1983), *cert. den.*, ____ U. S. ____, 104 S. Ct. 3546, 82 L. Ed. 2d 849 (1984), *United States* v. *Childress*, 715 F. 2d 1313 (8th Cir. 1983) (en banc), *cert. den.*, ____ U. S. ____, 104 S. Ct. 744, 79 L. Ed. 2d 202 (1984), *United States* v. *Whitfield*, 715 F. 2d 145 (4th Cir. 1983), but found satisfactory by two circuits. *McCray* v. *Abrams*, 750 F. 2d 1113 (2nd Cir. 1984), Pet. for Cert. Filed, No. 84-1426 (March 4, 1984), *United States* v. *Leslie*, 759

(Continued on next page.)

allows judicial review of the use of peremptories upon a prima facie showing of the circumstances of one case. The test derived from *Wheeler* consist of four steps. First, the objecting party must raise a "strong likelihood" that members of a cognizable group protected by the representative cross-section rule are being challenged for no reason other than their group association. *Id.* at 764. Second, the trial judge must make a determination that the pattern of peremptories in this one case gives rise to a "reasonable inference" of use based on group bias. *Id.* at 764. Third, if an inference is found, the burden shifts to the opposing party to suggest a reason to the satisfaction of the trial judge that the challenges were not properly exercised. *Id.* at 765. Fourth, the trial judge decides whether the "burden of justification" is met. If the objection is sustained, the trial judge shall dismiss the jurors, remaining veniremen and draw a new venire. *Id.* at 765.

While superficially innocuous, the adoption of the *Wheeler* rule would be of far reaching harm to the

---

(Continued from preceding page.)
F. 2d 366, *reh.* en banc granted, 759 F. 2d 366 (5th Cir. 1985). The precedents of three additional circuits suggests their adherence to *Swain*. *Cf. Weathersby* v. *Morris*, 708 F. 2d 1493 (9th Cir. 1983), *cert. den.*, ____ U. S. ____, 104 S. Ct. 719, 79 L. Ed. 2d 181 (1984) (*Taylor* analysis does not extend to petit juries.), *United States* v. *Cancel*, 708 F. 2d 894 (3rd Cir. 1983), *cert. den.*, ____ U. S. ____, 104 S. Ct. 165, 78 L. Ed. 2d 151 (1983) (Refusal to change the rule that "neither side need justify the use of peremptory challenges."), *United States* v. *Jenkins*, 701 F. 2d 850 (10th Cir. 1983) (Showing of systematic and intentional exclusion required to demonstrate unconstitutional use of peremptory challenge.).

judicial processes of this Nation, because each step of the rule presents an invitation to confusion and litigation.

1. Petitioner's Proposed Remedy is a Radical Departure from the Traditional Use of Peremptory Challenges.

Petitioner urges the adoption of the reasoning and remedy of *Wheeler*. However, unlike the first step in *Wheeler*, he proposes the total elimination of prosecutorial peremptory challenges.

His proposed remedy would tilt the balance of selecting an impartial jury. The result of this uneven procedure would be the selection of a partial jury or one of a particular composition. This is a radical procedure which would eliminate the traditional usage of peremptory challenges, destroy one of the procedures which guarantees the selection of an impartial jury and limit the prosecutor's participation in the jury selection process. See Saltzburg and Powers, Peremptory Challenges and the Clash Between Impartiality and Group representation, 41 Md. L. Rev. 337, 355-357 (1982).

2. The Second Step of the *Wheeler* Rule Creates a Standard for Judicial Review That is Unavoidably Vague and Impossible to Consistently Apply.

Step two of the *Wheeler* test requires a judicial determination of when protection shall begin by either a finding of a "reasonable inference" of improper bias in the use of peremptories or a conclusion to the contrary. This standard, will cause " 'difficult and often

close judgments'," *Wheeler* at 764, and is so vague that it will be impossible to consistently apply. In a reluctant concurrence in *Holley* v. *J. & S. Sweeping Co.*, 192 Cal. Rptr. 74 (Cal. Ct. App. 1983), a fear was expressed that Wheeler's "application from case to case will take the courts into the quagmire of quotas for groups that are difficult to define and even more difficult to quantify in the courtroom." *Id.* at 79.

The *Wheeler* court rejected the use of statistical analysis to establish a mathematical likelihood of a violation of the rule. The court recognized the inherent complexities of such methods and found it deficient because of the inability to accurately evaluate peremptory challenges. The court rejected the use of statistical analysis in a single case because of the discretionary use of the challenge and the existence of a small number of veniremen from which to draw a statistical sample *Id.* at 763.

The California Supreme Court suggested that certain facts may be given special consideration by the trial judge in reaching a decision. The fact of primary importance is the showing that a disproportionate number of a cognizable group are being removed. *Id.* at 764. What constitutes "disproportionate" for the purposes of this rule is left as unclear by the court as what groups are considered "cognizable." As the rule itself is founded on case-by-case review, it would seem that a trial judge at each objection must define disproportionate according to the circumstances as they

exist in the issue before him.[8] This will lead to a chameleon-like rule, the color of whose meaning will change as frequently as the facts to which it is applied.

The *Wheeler* court also found the manner in which voir dire examination is conducted, and the group membership of defendant in relation to that of the victim, to be supplemental factors for consideration to the primary concern of disproportionate removal. What weight is to be given these factors is now disputed in California courts. See *People* v. *Fuller*, 186 Cal. Rptr. 283 (Cal. App. 1982). *Wheeler* implies that inconsistent thoroughness in voir dire questioning or when conducted in desultory fashion is grounds for concern. The Court inferred that such questioning indicates a settled intent to strike on the part of the inquiring counsel. If any inconsistency in degree of defense or prosecution questioning can lead to a requirement to give reason for a peremptory challenge, counsel will either consistently make little use of the

---

[8]In the six years since the decision of *Wheeler*, the California Courts are struggling to define the "reasonable inference" standard in practical terms. See *People* v. *Rousseau*, 179 Cal. Rptr. 892 (Cal. Ct. App. 1982) (Striking of two of two group members was not prima facie evidence of improper use of peremptory challenges.) *Holley, supra*, (striking of three or four members was prima facie.) *People* v. *Hall*, 672 P. 2d 859 (Cal. 1983), (Striking of four of eight members was prima facie.), *People* v. *Walker*, 205 Cal. Rptr. 778 (Cal. Ct. App. 1984) (striking of seven of nine members was prima facie.) *People* v. *Alexander*, 205 Cal. Rptr. 387 (Cal. Ct. App. 1984) (Striking of four of five members was not prima facie.) *People* v. *Harvey*, 208 Cal. Rptr. 910 (Cal. Ct. App. 1984) (striking of two of three members was not prima facie.)

opportunity or uniformly indulge in a great number of queries even where frivolous.

The group memberships of the defendant and victim are less useful than the *Wheeler* Court implies because the affiliation is irrelevant to raising an objection regarding a possible violation of the representative cross-section rule. *Peters* v. *Kiff*, 407 U. S. 493 (1946). The trial court must consider the concerns of all those who assert that their right to fair trial is being violated whether the defendant and victim meet separate demographic classification or not.

3. The Third Step of the *Wheeler* Rule Changes the Peremptory Challenge to a Challenge for Cause Without Effectively Preventing the Biased Removal of Group Members from the Jury.

Once a judicial determination is made that a reasonable inference of misuse of a challenge exists, *Wheeler* then requires the opposing party to justify its actions. A reason of "specific bias" on the part of an individual veniremen and not simply a bias based on group association must be presented to the trial court to allow the questioned peremptory challenge to stand. *Id.* at 765.

Even though the *Wheeler* court stated that the "showing need not rise to the level of a challenge for cause," *Id.* at 765, the result of the rule would be the forcing of just such a conclusion.

The California Supreme Court, while insisting a recognizable difference remained, defined both the justification for a peremptory challenge and the pur-

pose of a challenge for cause as an attempt to remove an individual juror for "specific bias." *Id.* at 760. The requirement proposed for use in the third step of *Wheeler* is practically indistinguishable from the traditional meaning of a challenge for cause.[9] It will be an impossible task for trial judges to find a practical distinction between the two standards if the highest appellate court of California, after long and careful deliberation, cannot articulate separate definitions.

In an attempt to avoid the transformation of the peremptory, prosecution and defense counsels will develop a great wardrobe of explanations to dress their claims and clothe any biased intent. The *Wheeler* rule can only ask for a satisfactory reason and not the genuine reason for the exercise of a challenge. This limitation can be readily recognized and is obvious.

Not only will the *Wheeler* rule fail to adequately prevent what can be described as improper bias, but it may also serve to compel the acceptance by counsel of a jury he does not find to be impartial. Defense counsel, for example, may be compelled to accept the presence of Jewish jurors despite his fear that the

---

[9] "Challenges to the favour are where the party hath no principal circumstances of suspicion." 3 Blackstone Commentaries 362. "Challenge for cause. A request from a party to a judge that a certain prospective juror not be allowed to be a member of the jury because of specified causes or reasons." Black's Law Dictionary (5th Ed. 1979). "A Challenge for cause is a challenge to a juror for which some cause or reason is alleged, and is used to raise an objection to the qualifications or competency of particular jurors." 50 C.J.S. *Juries* 267.

obvious anti-Semitism of one of his key witnesses will inevitably prejudice such jurors against his client. Adoption of *Wheeler* or a variation of it will foster juries which are not impartial and are of a particular composition. *People* v. *Johnson*, 583 P. 2d 774 (Cal. 1978).

4. The Fourth Step of the *Wheeler* Rule Will Lead to Lengthy Delays in the Trial Process.

The trial judge, having heard the arguments of the prosecution and defense, must, at his discretion sustain or overrule the objection. If it is overruled, voir dire continues until completion and the jury is impanelled. On the other hand, if the objection is sustained, *Wheeler* requires the dismissing of the tainted venire and the drawing of a new one. *Id.* at 765. The California Supreme Court reached this conclusion by finding the intent of the fair and representative cross-section rule violated, because of the forced selection of a jury from a venire "partially or totally stripped of members of a cognizable group by the improper use of peremptory challenges." *Id.* at 765. The clear result of the procedures mandated by the *Wheeler* rule will be that the "lengthy process of voir dire will be rendered lengthier still." *Wheeler*, dissent at 769.

In rejecting a version of petitioner's "remedy" for use in their jurisdiction, the Court of Appeals of New York articulated the fear that:

> ". . . [T]o the extent that restrictions on a party's exercise of the peremptory challenge would require more extensive voir dire to disclose provable racial biases, as well as requiring extensive evi-

> dentiary hearings on motions to determine the motives of a party exercising a peremptory challenge, the rule proposed by the defendant would invite the additional delays at trial which our justice system can ill afford. In this era of overcrowded court calendars and scarce judicial resources, we should not alter the trial stage in such a way as to necessitate or encourage unwarranted additional lengthy delays." *People* v. *McCray*, 443 N. E. 915 (N. Y. 1982).

The burden on the administration of the justice system may also be felt by a compelled enlargement of the entire jury pool to accommodate the increased demand for completely new venires to comply with the representative cross-section rule as applied to the petit jury by an adoption of *Wheeler*.

5. The *Wheeler* Rule was Conceived For Use in a Particular Jurisdiction and the Problems of Applying it Nationally Will Lead to a Burdensome Increase in Appeals and Put an End to the Effective Use of the Peremptory Challenge.

The *Wheeler* rule is clearly problematic.[10] It is a rule which trial judges will be unable to consistently

---

[10]Several commentators have criticized as flawed and termed unnecessary the rule articulated in *Wheeler*. See Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md. L. Rev. 337 (1982), Younger, *Unlawful Peremptory Challenges*, 7 Litigation 23 (Fall 1980), Note, *People* v. *Payne and the Prosecution's Peremptory Challenges: Will They Be Preempted?* 32 Depaul L. Rev. 399 (1983), Comment, *Is There a Place for the Challenge of Racially-Based Peremptory Challenges?* 1984 Det. C. L. Rev. 703 (1984), Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 Yale L. J. 1177 (1980).

apply. It will require explanation of all peremptory challenges and will not detect or deter genuine improper bias. The conflicts and confusion by adopting *Wheeler* will generate and provide fertile ground for litigation and appeals.

The conclusion of the trial judge, on which the *Wheeler* rule so greatly relies, will frequently be termed an abuse of discretion by those parties who receive judgments adverse to their interest. This characterization will serve as foundation for an expansive number of claims for appeal, and when the decided majority of these contested convictions are affirmed through the appellate process, this assertion of error will become the justification for a petition for writ of habeas corpus. The *Wheeler* rule has already been extended into civil jury selection in the California courts. *Holley* v. *J & S Sweeping Co.*, *supra*. This extension further taxes the strained resources of a judicial system. It is the inherent nature of rules that are substantially subjective that they increase the demand for appellate courts to review the decisions of the trial judge. The California Supreme Court concluded that the right impaired is so fundamental that any discovered error is "prejudicial per se." *Wheeler*, at 766. The extention of such reasoning to all the judicial systems that are touched by the judgments of this Court would be a profound hindrance to the effective administration of justice. A federal district court aptly termed "pernicious" any rule that permits:

> ". . . [A]n individual, convicted of conspiracy to commit arson by blowing up a building within

> the City of New York, to overturn his conviction merely due to the invidious actions of a prosecutor in excluding a cognizable group from a petit jury concerning which there is *no reason to believe that those trial jurors finally selected were not fair and impartial*, simply because white jurors had been systematically excluded." *Roman* v. *Abrams*, 608 F. Supp. 629 (D.C. N.Y. 1985). (Emphasis added).

In finding all error harmful, the *Wheeler* court relies entirely on California state decisions. This reliance underlines the peculiar nature of this rule which petitioner and various amici fail to recognize. *Wheeler* is a judgment of a state court, interpreting a state constitution, and crafting a standard for use in a specific state system. The Supreme Court of Kentucky reviewed the *Wheeler* decision and found it unacceptable for use in this jurisdiction stating, "[w]e have recently reaffirmed our reliance upon *Swain* . . . and we decline to adopt another rule." (A 8). In *People* v. *McCray*, the Court of Appeals of New York stated:

> The defendant, in effect, would require the prosecutor to prove that a prospective juror's racial biases, whether based upon group affinity or otherwise, would interfere with the attainment of a fair and impartial verdict before that juror could be excused. We decline to adopt this position for it would convert the peremptory challenge system into a system based solely upon challenges for cause. Indeed, *we find no persuasive reason for departing from our present method of jury selection*. *McCray* at 917. (Emphasis added)

In states which have adopted the *Wheeler* rule, the particular procedures of those jurisdictions enhances the ability of the parties to influence the composition of the petit jury. In Massachusetts sixteen peremptory challenges are afforded each defendant and an equal number to the defense total is allowed the prosecution. Consequently, in *Commonwealth* v. *Soares*, 387 N.E. 2d 499, 508 fn. 6 (Mass. 1979), ninety-six peremptory challenges were available for use in selecting the twelve-person, petit jury. In the case *sub judice*, the prosecution was allowed only six (6) peremptory challenges and the defense nine (9). In Florida an individual convicted of an offense similar to that of petitioner's, could be found guilty by a petit jury of only six. Florida Stat. Annot., Section 913.10. It was with an awareness of these unique procedures that the high courts of these two states accepted the *Wheeler* rule into the law of their respective legal systems.

The peremptory challenge found its way into our common law legal system many years before the discovery of the continent upon which this Nation was established. In *Lewis* v. *U. S.*, 146 U. S. 370, 376 (1892) this Court described the peremptory as coming "from the common law with the trial by jury itself" and as having "always been held essential to the fairness of trial by jury."

The broad implications of petitioner's proposed "remedy" must be recognized and the rule's true results foreseen, for:

> "[T]he real question is whether to tinker with a system, be it of jury selection or anything else, that

has done the job for centuries. We stand on the shoulders of our ancestors, as Burke said. It is not so much that the past is always worth preserving, he argued, but rather that "it is with infinite caution that any man ought to venture upon pulling down an edifice, which has answered in any tolerable degree for ages the common purposes of society. . . ." However fair these decisions may seem in the abstract, in practice they undermine the jury trial. Let us hope that other courts take a more searching look at the problem." Younger, *Unlawful Peremptory Challenges,* 7 Litigation 23 (Fall 1980).

D. Justice is Better Served by the *Swain* Rule Than by the Proposed Rule.

Swain properly holds that only systematic exclusion of an identifiable group from jury service is a constitutional violation, because it excludes the group from participating in a function of citizenship. This holding should be reaffirmed.

Kentucky urges the Court to again hold that the Constitution does not give a criminal defendant the right to a jury of any particular composition, there should be no presumption of a constitutional violation when all of a cognizable group are struck from the jury panel in a particular case and state courts may continue to allow peremptory challenges in the traditional sense under the Fourteenth and Sixth Amendments of the Constitution.

CONCLUSION

The holdings of *Swain* and *Taylor*, are constitutionally sound and should be reaffirmed. The *Wheeler* test or any variation of it should be rejected because it was created pursuant to California law, would create judicial confusion and is too vague to apply nationwide. Consequently, the traditional use of peremptory challenges should continue as an integral part of American jurisprudence.

Respectfully submitted,

DAVID L. ARMSTRONG
Attorney General

By: CARL T. MILLER, JR.
Assistant Attorney General
Counsel for Respondent

RICKIE L. PEARSON
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601-3494
Co-Counsel for Respondent

FILED
OCT 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-6263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES KIRKLAND BATSON,

Petitioner,

v.

KENTUCKY,

Respondent.

On Writ Of Certiorari To The Supreme Court of Kentucky

REPLY BRIEF FOR PETITIONER

J. DAVID NIEHAUS
Deputy Appellate Defender of the Jefferson District Public Defender
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
(502) 587-3800
Counsel for Petitioner

FRANK W. HEFT, JR.
Chief Appellate Defender of the Jefferson District Public Defender
Co-Counsel for Petitioner

DANIEL T. GOYETTE
Jefferson District Public Defender
Of Counsel

BEST AVAILABLE COPY

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
ARGUMENT 1
CONCLUSION 11

TABLE OF AUTHORITIES

	Page
Brown v. *Board of Education*, 347 U.S. 483 (1954)	7
Commonwealth v. *Joliffe*, 7 Watts 585 (1838)	3, 4
Fay v. *New York*, 332 U.S. 261 (1947)	6
Heart of Atlanta Motel v. *United States*, 379 U.S. 241 (1964)	7
Hunter v. *Underwood*, ___ U.S. ___, 105 S.Ct. 1916 (1985)	7
Katzenbach v. *McClung*, 379 U.S. 294 (1964)	7
Loving v. *Virginia*, 388 U.S. 1 (1967)	7
McCray v. *Abrams*, 750 F.2d 1113 (2nd Cir., 1984)	7
Marbury v. *Madison*, 1 Cranch 137 (1803)	5
Norris v. *Alabama*, 294 U.S. 587 (1935)	7
R. v. *Chandler*, [1964] 1 All. Eng. R. 761	2
R. v. *Cook*, 91 Eng. Rep. 141 (1692)	2
R. v. *Edmonds*, 106 Eng. Rep. 1009 (1820)	2
Shelley v. *Kraemer*, 334 U.S. 1 (1948)	7
South Carolina v. *Katzenbach*, 383 U.S. 301 (1966)	7
Swain v. *Alabama*, 380 U.S. 202 (1965)	1, 2, 4, 6, 7, 9
Taylor v. *Louisiana*, 419 U.S. 522 (1975)	10
United States v. *Leslie*, 759 F.2d 366 (5th Cir., 1985)	7

STATUTES AND RULES:

33 Edw. I, c. 4 (1305)	2, 3
26 Halsbury's Laws of England, 4 ed., para. 628, p. 327.	2
Ky.R.Crim.Proc. 10.04	9

OTHER:

Baker, *An Introduction to English Legal History*, 2 ed., "Trial on Indictment", p. 416-417 (1979)	4
Devlin, *Trial By Jury*, Ch. 2, "The Composition of the Jury", p. 31-32 (1956)	2
38 Okla.L.Rev. No. 3 (Nov., 1985) (in progress) Doyel, "In Search of a Remedy for the Racially Discriminatory Use of Peremptory Challenges	6

ARGUMENT

In this Reply Brief, Petitioner responds to arguments raised by the Commonwealth of Kentucky that the nature and function of the peremptory challenge foreclose any supervision of its use, that race is a valid characteristic by which to identify possible juror bias and that Petitioner's failure to show lack of impartiality of the jury that tried his case requires denial of relief. These points are answered in the order presented. As to the objections to the remedy proposed by Petitioner, it should be noted that most were anticipated and answered in Petitioner's first Brief. Those that were not, such as application in civil cases, are generally problems raised because of state constitutional requirements. Those problems will not arise in the present Sixth Amendment context and, therefore, those points are not rehearsed in this Reply.

(A) ARGUMENT FROM THE HISTORY AND FUNCTION OF THE PEREMPTORY CHALLENGE.

A major portion of Respondent's Brief is taken up by its argument that this Court's conclusion as to the importance of peremptory challenges in *Swain* v. *Alabama*, 380 U.S. 202 (1965) requires insulation from review of the prosecutor's use of them in any one proceeding. This thesis is advanced throughout Respondent's Argument B. Although the historic development of peremptory challenges was traced in Petitioner's Brief, Petitioner here must elaborate on this history to rebut Respondent's argument that the adversary system of American and English Common Law supports the unfettered use of peremptory challenges by a state prosecutor. Respondent's argument is that the nature and the function of the peremptory challenge as it has developed simply will not admit of regulation by the courts. To dispose of this con-

tention, it is necessary to examine more closely the origins of the prosecutor's peremptory challenge.

In *Swain* the Court equated the procedure of standing aside jurors with a prosecutorial peremptory challenge. *Swain* v. *Alabama*, 380 U.S. at 213. The assumption made there was that the right to stand aside without statement of cause was the equivalent of a peremptory challenge and that standing aside was devised in order to evade the statute of 33 Edw. I, c. 4 (1305) which forbade prosecutorial peremptory challenges. 380 U.S. at 213. It is certainly true that the practice of standing aside grew out of judicial construction of the statute, but examination of English precedents and the few American precedents that address the standing aside procedure in proper historical context shows that the Court's conclusion in *Swain* was mistaken.

Under the Statute 33 Edw. I, c. 4, the prosecutor for the Crown was forbidden to challenge jurors without stating cause. The doctrine of standing aside jurors developed under this statute not to nullify the statute in favor of prosecutorial peremptory challenges but rather to allow the Crown to comply with the rules of voir dire and challenge for cause. Unlike American practice, in English practice neither party may examine a juror on voir dire unless a factual foundation showing prima facie a probability of prejudice is first laid. 26 Halsbury's Laws of England, 4 ed., 628 p. 327; Devlin, *Trial By Jury*, Ch. 2, "The Composition of the Jury", p. 31-32 (1956). Ancient and modern English authorities show that this rule has been in effect throughout the period of recorded law. *R.* v. *Cook*, 91 Eng. Rep. 141 (1692); *R.* v. *Edmonds*, 106 Eng. Rep. 1009 (1820); *R.* v. *Chandler*, [1964] 1 All. Eng. R. 761. Obviously, the justices and prosecutors traveling on eyre could not be expected to produce the needed extrinsic

evidence on short notice. Time was needed to make inquiries and obtain the witnesses to show the probability of prejudice. To allow this time, the standing aside rule was developed. This conclusion is confirmed in the only American case found on this subject. In *Commonwealth* v. *Joliffe*, 7 Watts 585, 588 (1838), the Supreme Court of Pennsylvania in discussing the practice of standing aside noted that

> . . . the attorney general, who is usually unassisted by a private prosecutor in capital cases, and whose business it is not to hunt up witnesses, might be unprepared with instant proofs and yet be perfectly prepared at the close of the panel.

It is apparent that the practice of standing aside did not develop as a matter of Crown prerogative or as an attempt to avoid the effect of the statute of 33 Edw. I. Rather, the practice was the result of a practical construction of the statute to allow the prosecution a fair opportunity to obtain the proof necessary to present a challenge for cause, the only type of challenge allowed by law. Because this is so, an appeal to the "very old credentials" of the peremptory challenge cannot refer to the peremptory challenge of the prosecutor.

The best evidence available shows that a prosecutor's ability to challenge peremptorily (i.e. without possibility of judicial intervention) came into existence only when Congress and the state legislatures, by positive enactment, granted that ability. No such right had existed in English jurisprudence since the enactment of 33 Edw. I, c. 4 in 1305. Thus, when the peremptory challenge of the prosecutor is spoken of, one is speaking of a legal device that has existed in most jurisdictions for less than 150 years. Respondent neglects the very real differences between the defendant's right to challenge peremptorily,

which grew out of his powerlessness when confronted with the power of the state in criminal prosecutions, and that of the prosecutor.[1] It seems reasonable to conclude that prosecutors were given peremptory challenges because the legislatures perceived that, as in *Commonwealth* v. *Joliffe*, cited above, juries tended to acquit in the face of overwhelming evidence and determined that the prosecutor should have some means of excluding persons thought to be biased but not easily proved so. The legislatures may simply have decided that peremptory challenges would streamline court procedure and eliminate the need for the prosecutor to obtain and present witnesses simply to have the opportunity to question a juror about his possible bias. But no matter what purpose the change was designed to make, in most instances the number of peremptory challenges given to the prosecutor was smaller than the number afforded to the defendant. *Swain* v. *Alabama*, 380 U.S. at 216. The obvious purpose of the smaller number of challenges was to prevent the state from using peremptory challenges to affect mate-

---

[1] The quotation from Blackstone that is often referred to in peremptory challenge cases [e.g. *Swain*, 380 U.S. at 212, n.12] is misleading unless put in proper context. In Blackstone's day the defendant was in need of the law's solicitude. Until the 19th Century reforms in England, once a criminal defendant had exercised his peremptory challenges, his participation in the trial, for all practical purposes ceased. The defendant was rarely assisted by counsel and was not allowed to compel attendance of witnesses. When witnesses for the defense appeared, they were not allowed to be sworn. The length of a criminal trial was usually only a few minutes. [Baker, *An Introduction to English Legal History*, 2 ed. "Trial on Indictment," p. 416-417 (1979)]. There was little need for peremptory challenges by the prosecutor under these circumstances. This is why no such peremptory challenges existed in England. No such peremptory challenges existed in the United States until they were created by legislation.

rially the composition of the jury. The purpose of prosecutorial peremptory challenges is to remove those veniremen whose impartiality is in doubt, not to eliminate one group from the mix required for a representative jury.

The right of peremptory challenges on behalf of the prosecution is the product of state legislative action of relatively recent occurrence. If use of these peremptory challenges interferes in a material way with a defendant's right to a representative jury, then the use of the challenges must be subordinated to the defendant's Sixth Amendment right. *Marbury* v. *Madison*, 1 Cranch 137 (1803). The Constitution does not make this Court the guarantor of the rights of the states. Clearly, prosecutorial peremptory challenges were not received in America as part of the common law. Thus, the "adversarial system" alluded to by Respondent in its Brief does not render the Court powerless to control misuse of peremptory challenges by agents of the State. At best, a desire to maintain the adversarial system should only prevent the granting of an unfair advantage to the defendant over the prosecutor. That certainly is not the result here. The restriction on the exercise of prosecutorial peremptory challenges suggested by Petitioner in this case is minimal and justified. Therefore, Respondent's arguments based on the history and function of the peremptory challenge is unconvincing and should be disregarded.

(B) ARGUMENT THAT RACE IS A VALID CHARACTERISTIC BY WHICH TO IDENTIFY POSSIBLE JUROR BIAS.

In part B(2) of its Argument, Respondent maintains that the use of "group characteristics" as a means of identifying probable prejudice in a case is perfectly acceptable

under the law and that this Court in *Swain* concluded that such use was proper as a traditional use of the jury system. This contention accurately reflects the holding of the Court in *Swain*. However, the tradition appealed to must be considered against the background of America's history and what the Court has called the long history of unhappy relations between white and black people. *Fay* v. *New York*, 332 U.S. 261, 282 (1947). Also, careful reflection on the logic underlying the use of group characteristics as a predictor of possible bias shows that the practice is not reasonable at all.

The majority opinion in *Swain* holds that peremptory challenges aid in obtaining an impartial jury because the peremptory challenge eliminates the extremes of partiality. *Swain* v. *Alabama* 380 U.S. at 219; 211-212. And because all persons remaining on the panel are "alike subject to being challenged without cause" the elimination of black jurors by peremptory challenges is unobjectionable. 380 U.S. at 221. This conclusion is convincing only if one agrees that race or color is just another characteristic like occupation or street address that can fairly be used to evaluate partiality and that impartiality is obtained by replacing a black juror with a white. Neither assumption will withstand close analysis.[2]

The history of America shows that race is most definitely not a characteristic like religion, occupation or eye color. For most of the years of this country's existence, skin color has determined whether a person could vote, sit on a jury, go to first class schools, buy property, stay in

---

[2] The premises of the argument made here are taken from a similar discussion of the topic in a master's thesis authored by Prof. Robert Doyel of Mercer University. The thesis will be published in November, 1985, in 38 Okla. L. Rev. No. 3.

certain hotels, eat in certain restaurants and marry whom one wished.[3] Just this past term the Court was called upon to invalidate a provision of a state constitution which disenfranchised blacks. *Hunter* v. *Underwood*, ___ U.S. ___, 105 S.Ct. 1916 (1985). The contention that all persons on a jury panel might be challenged peremptorily does not take into account the fact that black veniremen are a good deal more likely to be so challenged than any other group. Arguments that maintain that a prosecutor will not strike blacks when there is a possibility that some other prospective juror might be more biased. [e.g. dissents in *United States* v. *Leslie*, 759 F.2d 366, 393 (5th Cir., 1985); *McCray* v. *Abrams*, 750 F.2d 1133, 1138 (2nd Cir., 1984)] ignore the irrationality of racial prejudice which results from ignorance about black people and from the stereotyped ideas that arise from that ignorance. A prosecutor does not have to be hostile to blacks or overtly prejudiced in order to possess ideas about "typical" blacks. He has only to be ignorant about blacks or know only about a certain segment of the black community. These ideas or attitudes may cause a prosecutor to conclude that few prospective jurors will be more biased against his case. The belief that the black veniremen will be biased will cause the use of a peremptory challenge to remove him. Because in nearly all areas the white population outnumbers the black population, the chances are good that a white person will replace the black on the panel. In the present case, the prosecutor did not have to

---

[3] Citations to the cases considering these issues are: *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Loving* v. *Virginia*, 388 U.S. 1 (1967).

use all of his peremptory challenges to remove all blacks and obtain an all white jury. If, as the Court posited in *Swain*, the peremptory challenge is made by a prosecutor who knows little about the prospective jurors [380 U.S. at 221] the explanation for the challenge must be either that an unknown white juror can be impartial but the black juror cannot or that the prosecutor believes that a white juror will be more favorable to his case. Neither explanation justifies dimunition of the representative jury brought about by neutral selection procedures. The first explanation is simply unreasonable unless the inability of blacks to listen fairly to a case involving a black defendant is accepted as true. As to the second explanation, it is plain that in this instance the peremptory challenge is used to pack the jury with favorable jurors, not to eliminate partiality. Thus, patently, the race of a juror, standing alone, is not sufficient to predict partiality. The history of this country shows that race is usually the basis for discrimination rather than a logical basis of a procedure to assure impartiality in a petit jury. The argument that race is an acceptable ground for exercise of peremptory challenges must be rejected. The proposal made by Petitioner in this case does no more than allow determination that the representative character of a petit jury is not diminished or destroyed on the basis of a prosecutor's unreasonable belief. It is a small intrusion into a state privilege to assure that in a criminal case the jury that sits represents the community. The Court is, therefore, urged to reject Respondent's argument on this point.

(C) ARGUMENT THAT PETITIONER'S FAILURE TO SHOW LACK OF AN IMPARTIAL JURY REQUIRES DENIAL OF RELIEF.

Both Respondent and Amicus, the United States of America, argue that because Petitioner did not show that

the jury tried his case was not impartial, he has no real cause of complaint. This argument lacks substance. No juror admitted to prejudice against one side or the other. However, there is almost never any direct evidence of juror partiality in a criminal case once the proceedings get past the challenges for cause. In Kentucky, as in most states, the jurors may not be questioned after the return of the verdict. Ky.R.Crim. Proc. 10.04. Unless the evidence overwhelmingly favors one party over the other, partiality or its absence is not indicated by the jury's verdict. Therefore, in almost all cases, partiality of jurors must be determined indirectly. One might well reverse the question of whether Petitioner can show lack of impartiality and instead ask for evidence that the peremptory challenges exercised by the prosecutor tended to foster impartiality by eliminating the extremes of partiality. The Court has held in *Swain* that such peremptory challenges do contribute to impartiality but no hard evidence of this effect has ever been adduced. As a matter of deduction, the Court reasoned that because peremptory challenges could be used to eliminate persons of doubtful impartiality and because peremptory challenges had been in use for a very long time, peremptory challenges therefore tended to eliminate the "extremes" of partiality and produce a jury that would try a case on the evidence rather than on the prejudices of the jurors. 380 U.S. at 219. There is no doubt that peremptory challenges can achieve this effect. There is no evidence that peremptory challenges necessarily do so. As shown in the argument just preceding, the prosecutor might well use his challenges to remove all blacks because of stereotypical ideas he possesses about that group of people. Given the long history of discrimination against blacks, this use may well be more likely than use to remove veniremen of doubtful impartiality. In any event, there is no hard evidence to show that the effect

spoken of in *Swain* is actually obtained in all or even in many cases. The conclusion reached in *Swain* was achieved by deduction not by empirical study. Because it is so difficult to obtain direct evidence of impartiality or partiality, the Court, when fashioning rules for the use of peremptory challenges, must take those steps that are most likely to effect the desired result, impartiality. The most obvious step is to create a jury of diverse character so that a fair range of experiences and beliefs is represented. When a prosecutor is allowed to remove an entire group without having some articulable reason, the possibility of a sufficiently diverse jury is destroyed.

The remedy proposed by petitioner is more likely to result in an impartial jury than is possible under the present rule. Under *Swain*, the peremptory challenges of the prosecutor are insulated from any inquiry. The chances of corrective action against the prosecutor are practically nonexistent. However, under the remedy proposed by Petitioner, when reason and common sense dictate inquiry into the prosecutor's actions, inquiry can be made. When the number of peremptory challenges made by the prosecutor gives rise to a reasonable belief that no sufficient reason underlies his attempt to remove a group from the jury, he can be called upon to articulate some reason that justifies diminution of the representative character of the jury. Because diversity in the composition of the jury is a better device to assure impartiality than is a peremptory challenge, the Court should adopt Petitioner's argument. Jury diversity is recognized as a component of the Sixth Amendment right to trial by an impartial jury. *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). Petitioner asks no more than adoption of the best means possible to insure that diversity is carried through from jury selection to jury empanelling. Therefore, the Court

should disregard Respondent's argument as to lack of evidence of impartiality.

CONCLUSION

No argument raised by Respondent answers the showing of necessity and desirability of the adoption of the remedy set out in Petitioner's first Brief. The Court is, therefore, urged to grant the relief moved for in the Conclusion of his first Brief.

J. DAVID NIEHAUS
Deputy Appellate Defender of the Jefferson District Public Defender
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
(502) 587-3800
Counsel for Petitioner

FRANK W. HEFT, JR.
Chief Appellate Defender of the Jefferson District Public Defender
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
(502) 587-3800
Co-Counsel for Petitioner

DANIEL T. GOYETTE
Jefferson District Public Defender
Of Counsel

Office-Supreme Court, U.S.
FILED
JUN 25 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-6263 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES KIRKLAND BATSON,

Petitioner,

—v.—

COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF OF MICHAEL McCRAY, THE NEW YORK CIVIL LIBERTIES UNION, AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE*

STEVEN R. SHAPIRO
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

Attorney for *Amici Curiae*

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... iii

CASES..... iii

STATUTES AND RULES..... ix

LEGISLATIVE HISTORY..... ix

OTHER AUTHORITIES..... ix

INTEREST OF AMICI..... 1

PRELIMINARY STATEMENT..... 4

STATEMENT OF FACTS..... 5

SUMMARY OF ARGUMENT..... 13

ARGUMENT..... 16

THE USE OF PEREMPTORY CHALLENGES TO EXCLUDE POTENTIAL JURORS SOLELY ON THE BASIS OF RACE OFFENDS BASIC NOTIONS OF EQUALITY AND DISTORTS THE REPRESENTATIVE FUNCTION OF THE JURY..... 16

A. First Principles..... 17

B. The Premises of Swain..... 34

Page

C. The Impact of *Swain*..... 42

D. An Alternative to *Swain*..... 53

CONCLUSION..... 63

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Louisiana,
405 U.S. 625 (1972)..... 33, 55

Avery v. Georgia,
345 U.S. 559 (1953)..... 21, 22

Ballard v. United States,
329 U.S. 187 (1946)..... 26

Ballew v. Georgia,
435 U.S. 223 (1978)..... 25, 29

Bell v. Hood,
327 U.S. 678 (1946)..... 53

Bush v. Kentucky,
107 U.S. 110 (1883)..... 32

Carter v. Jury Commission,
396 U.S. 320 (1970)..... 33

Carter v. Texas,
177 U.S. 442 (1900)..... 21

Cassell v. Texas,
339 U.S. 282 (1950)..... 19

Castaneda v. Partida,
430 U.S. 482 (1977)..... 33, 55, 57

Page

Commonwealth v. Soares,
377 Mass. 461 (1978),
387 N.E.2d 499, cert. denied,
444 U.S. 881 (1979)..... 51, 53

Duncan v. Louisiana,
391 U.S. 145 (1968)..... 8, 28

Ex Parte Virginia,
100 U.S. 339 (1880)..... 32

Hale v. Kentucky,
303 U.S. 613 (1938)..... 33

Ham v. South Carolina,
409 U.S. 524 (1973)..... 38

Harris v. Texas,
___ U.S. ___, 82 L.Ed.2d
858 (1974)..... 32, 49

Hernandez v. Texas,
347 U.S. 475 (1954)..... 33, 60, 61

Hill v. Texas,
316 U.S. 400 (1942)..... 33

Hobby v. United States,
___ U.S. ___, 82 L.Ed.2d
260 (1984)..... 26

Hollins v. Oklahoma,
295 U.S. 394 (1935)..... 33

Johnson v. Louisiana,
406 U.S. 356 (1972)..... 28

Page

McCray v. Abrams,
576 F.Supp. 1244, (E.D.N.Y.
1983), aff'd in part,
reversed in part, 750 F.2d
1113 (2d Cir. 1984), pet.
for cert. pending, No. 84-1426,
53 U.S.L.W. 3671
(March 4, 1985)..... passim

McDonnell Douglas v. Green,
411 U.S. 792 (1973)..... 55

Neal v. Delaware,
103 U.S. 370 (1881)..... 32

Norris v. Alabama,
294 U.S. 587 (1935)..... 20, 21

Oklahoma City v. Tuttle,
53 U.S.L.W. 4639 (1985)..... 44

Patton v. Mississippi,
332 U.S. 463 (1947)..... 33

People v. Hall,
35 Cal.3d 161,
672 P.2d 854 (1983)..... 60

People v. McCray,
104 Misc.2d 782 (Sup.Ct.
Kings Co. 1980), aff'd,
57 N.Y.2d 542, 457 N.Y.S.2d
441 (1982), cert. denied,
___ U.S. ___, 103 S.Ct.
2438 (1983)..... 1, 7, 46,
50, 59

Page

People v. Payne
457 N.E.2d 1202 (Ill. 1983)..... 31

People v. Thompson,
79 A.D.2d 87, 435 N.Y.S.2d
739 (2d Dept. 1981)..... 49

People v. Wheeler,
22 Cal.3d 258,
583 P.2d 748 (1978)..... 50, 53, 54,
57, 58, 59

Peters v. Kiff,
407 U.S. 493 (1972)..... 24, 27, 33

Pierre v. Louisiana,
306 U.S. 354 (1939)..... 33

Ridley v. State,
475 S.W.2d 769 (Tex.
Crim.App. 1972)..... 48

Ristaino v. Ross,
424 U.S. 589 (1976)..... 38

Rogers v. Alabama,
192 U.S. 226 (1904)..... 33

Rose v. Mitchell,
443 U.S. 545 (1979)..... 22, 23

Smith v. Texas,
311 U.S. 128 (1940)..... 20, 34, 36

Stanley v. Illinois,
405 U.S. 645 (1972)..... 40

Page

State v. Brown,
371 So.2d 751 (La. 1979)..... 45

State v. Crespin,
94 N.M. 486, 612 P.2d
716 (1980)..... 51, 53

State v. Neil,
457 So.2d 481 (Fla. 1984)..... 51, 53

State v. Washington,
375 So.2d 1162 (La. 1979)..... 45

Strauder v. West Virginia,
100 U.S. 303 (1980)..... 18, 19

Swain v. Alabama,
380 U.S. 202 (1965)..... passim

Taylor v. Louisiana,
419 U.S. 522 (1975)..... passim

Texas Dept. of Community
Affairs v. Burdine,
450 U.S. 248 (1981)..... 57

Thiel v. Southern Pacific Co.,
328 U.S. 217 (1946)..... 19, 24, 33

Turner v. Fouche,
396 U.S. 346 (1970)..... 33

United States v. Carter,
528 F.2d 844 (8th Cir.
1975), cert. denied, 425
U.S. 961 (1976)..... 46

Page

United States v. Childress,
715 F.2d 1313 (8th Cir.
1983)(en banc), cert.
denied, ___ U.S. ___,
104 S.Ct. 744 (1984)..... 30, 52

United States v. Leslie,
No. 83-3719, ___ F.2d ___,
(5th Cir. April 10, 1985)..... 51, 53, 63

United States v. Nelson,
529 F.2d 40 (8th Cir. 1976)..... 47

United States v. Newman,
549 F.2d 240 (2d Cir. 1977)..... 45

United States v. Pearson,
448 F.2d 1207 (5th Cir. 1971).... 48

Weathersby v. Morris,
708 F.2d 1493 (9th Cir. 1983).... 52

Whitus v. Georgia,
385 U.S. 545 (1967)..... 33

Williams v. Florida,
399 U.S. 78 (1970)..... 28

Witherspoon v. Illinois,
391 U.S. 510 (1968)..... 29

Page

STATUTES AND RULES

Federal Jury Selection and Service Act of 1968, Pub.L. 90-274, 82 Stat. 53, 28 U.S.C. §1861..... 27

Rule 36.2, Rules of the United States Supreme Court..... 1

LEGISLATIVE HISTORY

H.R.Rep. No. 1076, 90th Cong., 2d Sess. 8 (1968)..... 27

OTHER AUTHORITIES

Annot., "Use of Peremptory Challenge t Exclude from Jury Persons Belonging to a Class or Race," 79 A.L.R.3d 14 (1975)..... 45

Brown, McGuire & Winters, "The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse," 14 New Eng.L. Rev. 192 (1978)..... 50

Comment, The Prohibition of Group-Based Stereotypes in Jury Selection Procedures, 25 Vill.L.Rev. 339 (1979)..... 32

Page

Comment, "The Prosecutor's Exercise of The Peremptory Challenge to Exclude Non-White Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause," 46 U.Cin.L.Rev. 554 (1977)..... 50

Loftus, E., EYEWITNESS TESTIMONY (1979)..... 24

Malpass and Kravitz, "Recognition for Faces of Own and Other Race," 31 J. Personality and Social Psychology 330 (1979)..... 24

Note, "Limiting the Peremptory Challenge: Representation of Groups on Petit Juries," 86 Yale L.J. 1715 (1977)..... 50

Van Dyke, J., JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS (1977)..... 46

Winick, "Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis," 81 Mich.L.Rev. 1 (1982)..... 44, 50

INTEREST OF AMICI[1]

Michael McCray has been litigating the constitutionality of race-based peremptory challenges in state and federal court for nearly six years. A petition for certiorari in his case is now pending before this Court. Abrams v. McCray, No. 84-1426, 53 U.S.L.W. 3671 (March 4, 1985).[2]

On an earlier petition for certiorari in McCray's case, ___ U.S. ___, 103 S.Ct. 2438 (1983), a majority of this Court indicated for the first time its willingness to re-examine the continuing validity of Swain v.

---

1. Letters of consent to the filing of this brief have been separately lodged with the Clerk of this Court pursuant to Rule 36.2.

2. McCray's motion to expedite further consideration of the petition for a writ of certiorari and consolidate his case with Batson for purposes of oral argument was denied on May 13, 1985, 53 U.S.L.W. 3807 (Brennan, Marshall and Stevens, JJ., dissenting).

Alabama, 380 U.S. 202 (1965). Shortly thereafter, McCray's case became the vehicle for the first federal opinions departing from Swain. In both the district court and the Court of Appeals, McCray obtained decisions holding that the prosecutor's use of peremptory challenges to create a racially skewed jury violates the Constitution even in the absence of evidence establishing a pattern and practice of similar actions in other prosecutions. McCray v. Abrams, 576 F.Supp. 1244 (E.D.N.Y. 1983), aff'd in part, rev'd in part, 750 F.2d 1113 (2d Cir. 1984).

By granting certiorari in Batson, this Court has necessarily called into question the correctness of those judgments and, by extension, McCray's entitlement to relief. McCray's stake in the outcome of this case is, therefore, personal and immediate. McCray's participation in this case also offers the Court another factual record

against which to judge the impact and propriety of race-based peremptory challenges.

The New York Civil Liberties Union (NYCLU) is a state affiliate of the American Civil Liberties Union (ACLU) dedicated to the preservation of individual rights. This case threatens those rights in several critical ways. First, by perpetuating the practice of racial discrimination in jury selection, race-based peremptory challenges maintain a legacy of racial stigmatization that violates the most basic premises of the equal protection clause. Second, the deliberate disqualification of potential jurors solely because of their race abridges the right of every criminal defendant to trial by an impartial jury drawn from a representative cross-section of the community.

PRELIMINARY STATEMENT

The issues presented by this case are of paramount importance to the criminal justice system. Should a prosecutor be able to use peremptory challenges to create a jury intentionally chosen along racial lines? If not, can standards be developed that will preserve the benefits of peremptory challenges, eliminate the evils of racial discrimination, and prevent further congestion in a trial calendar that is already overcrowded?

No defendant has a right to choose his own jury. On occasion, black defendants may be tried before all white juries and white defendants may be tried before all black juries. The prosecutor's purposeful use of peremptory challenges to produce that result, however, is not a benign act. It resonates

with a history of past discrimination and perpetuates a perception that blacks cannot be treated fairly in the criminal justice system. The loss of confidence that results, and the potential for verdicts based on bias, easily outweigh any benefits that accrue. In a society committed to the fair administration of justice and equal protection of the laws, it is a practice that should no longer be permitted to continue.

STATEMENT OF FACTS

Amici accept the statement of facts contained in petitioner's brief. They offer, in addition, the statement of facts in Michael McCray's case as further evidence of the practical impact of race-based peremptory challenges.

Michael McCray was arrested in New York City on charges of first and second degree

robbery on December 5, 1978. McCray is black. The only evidence ever produced against him was an identification by the crime victim, who is white.

McCray's first trial ended in a hung jury with at least two and possibly all three of the minority jurors voting to acquit. McCray's second trial ended in conviction by an all white jury. During jury selection in the second case, the prosecution exercised either eleven or twelve peremptory challenges.[3] Eight of those challenges were used to excuse the only minority members drawn for the jury: seven blacks and one hispanic. One minority juror was challenged by the prosecution despite testimony during voir dire that a close relation or friend had recently been shot during a robbery.

3. The record is ambiguous on the exact number.

After unsuccessful appeals through the state court system,[4] McCray was granted habeas corpus relief by the district court, which concluded that "the coherence of the Swain opinion depends upon. . . assumptions whose validity has been at least diluted since 1965." McCray v. Abrams, 576 F.Supp. at 1247.

The Second Circuit affirmed the constitutional principle of non-discrimination enunciated by the district court in a lengthy opinion written by Judge Kearse and joined by Judge Lumbard. McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984).[5] The court began its

4. People v. McCray, 104 Misc.2d 782 (Sup.Ct.Kings Co. 1980), aff'd, 57 N.Y.2d 542, 457 N.Y.S.2d 441 (1982).

5. Judge Meskill dissented on the ground that Swain foreclosed McCray's claim regardless of its constitutional footing. 750 F.2d at 1135.

analysis by describing the virtually impossible task of litigants seeking to satisfy the evidentiary burden of Swain. Id. at 1120-22. Noting that the Sixth Amendment was not applied to the states until Duncan v. Louisiana, 391 U.S. 145 (1968), three years after Swain, Judge Kearse then reviewed the increasingly strong link forged by this Court between the constitutional requirement of an impartial jury and a jury drawn from a fair cross-section of the community. 750 F.2d at 1124-1128. Based on that review, the Second Circuit concluded that this Court's decisions under the Sixth Amendment demanded application of the fair cross-section requirement to the petit jury as well as the jury venire.

As Judge Kearse observed:

> No defendant has ever been tried before a venire; the venire is not the body that deliberates in the jury room; no defendant has even been found guilty by a venire. If there is a Sixth Amendment

> requirement that the venire represent a fair cross section of the community, it must logically be because it is important that the defendant have the chance that the petit jury will be similarly constituted. The necessary implication is that the Sixth Amendment guarantees . . . that possibility.

Id. at 1128-29.

The fair cross-section requirement articulated by the Second Circuit in McCray's case does not entitle a criminal defendant to a jury that reflects the community-at-large in any proportional sense. It prohibits, however, the intentional manipulation of the jury selection process to produce a clearly imbalanced result that targets a particular group of citizens for exclusion from jury service on grounds of race or other suspect criteria. The presumption in all cases is that the jury has been constitutionally chosen. But a criminal defendant can make out a prima facie case under the Sixth

Amendment by showing the excluded jurors belong to a "cognizable group" within the community and, furthermore, that there is a "substantial likelihood" that the exclusions were based on group affiliation rather than an individual juror's ability to decide the case fairly. Id. at 1131-32.

Once a prima facie case is made out under the Second Circuit's rule, the burden shifts to the prosecution to offer some racially neutral explanation for the pattern of peremptory challenges. Id. at 1132. The prosecutor's explanation need not rise to the level of cause -- indeed, "[t]here are any number of bases on which a party may believe, not unreasonably, that a prospective juror may have some slight bias that would . . . make excusing him or her desirable." Id. Unless pretextual, those reasons will be accepted at face value. In the absence of any non-pretextual reason, the Second Circuit

held, the defendant is constitutionally entitled to a new jury.[6]

The Second Circuit decision rests entirely on Sixth Amendment grounds. Nevertheless, the court acknowledged that much of its reasoning applies with equal force to the Fourteenth Amendment claims rejected by Swain. Id. at 1121. Of particular relevance to any reexamination of the equal protection issue considered in Swain, the Second Circuit found, "as a practical matter," id., that blacks and other minorities are more likely than whites to suffer systematic exclusion from particular juries through the prosecutor's use of peremptory challenges.

Finally, the Second Circuit summarized

---

6. In McCray's case, the Second Circuit remanded to the district court for a hearing to determine if the state could rebut the prima facie case that McCray had established. 750 F.2d at 1134-35.

its decision with the following comment:

> According to Swain . . . there is no type of case in which blacks may not be summarily eliminated on the presumption that the prosecutor is merely seeking a "fair and impartial jury." The premise of Swain and the rarity of wholesale challenges to white venirepersons thus serve only to limit artificially the opportunity of blacks for participation in our system of justice, and to perpetuate an invidious proposition of racial inferiority that has been outlawed in virtually every area of public affairs -- in employment, in education, in housing, in property rights. How unfortunate that the invidious proposition has been allowed to flourish in the administration of justice.

Id. at 1122.

On March 4, 1985, the State of New York filed a petition for a writ of certiorari from the Second Circuit decision in McCray's case. No. 84-1426, 53 U.S.L.W. 3671. That petition is still pending.

SUMMARY OF ARGUMENT

In a broad array of cases spanning more than a century, this Court has repeatedly condemned racial discrimination in jury selection, no matter what its form and no matter when in the process of jury selection the discrimination occurs. Two principles underlie these decisions. First, the fundamental notion that individuals should not be barred from participating in important civic functions, like jury duty, solely because of their race. Second, the recognition that the legitimacy of the jury as an institution is greatly diminished if it does not represent a fair cross-section of the community.

Swain forcefully affirms the propriety of these constitutional principles. It does not condone discrimination in jury selection; it rejects it in the strongest possible

language. At the same time, Swain properly acknowledges the historical pedigree and modern significance of peremptory challenges. The evidentiary standard imposed by Swain can best be understood as a pragmatic remedy developed by the Court in the hope that it would both prohibit discrimination and preserve the salutary features of the peremptory challenge. Specifically, Swain requires that a criminal defendant alleging race discrimination in the prosecutor's use of peremptory challenges demonstrate that peremptory challenges have been used in case after case within the same jurisdiction to eliminate any participation by minorities in the administration of justice.

After twenty years, it is now irrefutably clear that Swain has not accomplished its original purpose. Instead, it has encouraged a process of selecting jurors that sees race discrimination as a permissible trial tactic.

That attitude is without corollary in American constitutional law.

Not surprisingly, Swain has produced an avalanche of criticism since it was written. Within the past decade, four states and two federal circuits have modified its seemingly inflexible rule. In the best traditions of the common law, this period of experimentation has demonstrated two facts that run directly contrary to the assumptions of Swain. It is now abundantly clear that peremptory challenges can and will survive a modified rule that forbids their use for discriminatory reasons. And it is equally clear that Swain has in fact produced discriminatory results, not the evenhanded arbitrariness that the decision predicted.

This Court should not ignore those important lessons. Simply put, Swain has led to more discrimination, not less. It is inconceivable that this Court intended that

result and unconscionable to allow it to continue any longer.

ARGUMENT

THE USE OF PEREMPTORY CHALLENGES TO EXCLUDE POTENTIAL JURORS SOLELY ON THE BASIS OF RACE OFFENDS BASIC NOTIONS OF EQUALITY AND DISTORTS THE REPRESENTATIVE FUNCTION OF THE JURY

This case does not present a clash of basic values. The principles of non-discrimination and representative juries that govern this case are so firmly woven into the fabric of American law that they are largely uncontested. Rather, this case represents another stage in the ongoing search for the best method to enforce those principles in actual practice.

Swain presents one remedial approach to the problem of discrimination in the criminal justice system. But like all remedial decisions, it is subject to reevaluation in

light of subsequent experience. Amici believe that Swain should be modified, not because its basic values are wrong but because its basic values are right. Unfortunately, those values have not been adequately protected by the procedures that Swain devised.

A. First Principles

For more than a century, this Court has grappled with racial discrimination in jury selection, one of the earliest forms of race discrimination in this country and one of the most persistent. And for more than a century this Court has insisted, in the strongest possible terms, that racial discrimination in jury selection is constitutionally intolerable.

Two fundamental principles emerge from the case law to explain this unwavering

judicial response. The first is derived from notions of equality and individual human dignity embodied in the Constitution, and recognizes jury discrimination for what it most surely is -- a continuing badge of racial inferiority. The second thread running through this Court's jury discrimination cases is that the jury works best when it fairly represents the community whose judgment it is empowered to deliver.

The equality principle was first articulated in Strauder v. West Virginia, 100 U.S. 303 (1880), which struck down a Jim Crow statute limiting jury service to "white male persons who are twenty-one years of age."

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an

> assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Id. at 308.

Since Strauder, the Court has often stressed the core equal protection notion that jurors "should be selected as individuals, on the basis of individual qualifications, and not as members of a race." Cassell v. Texas, 339 U.S. 282, 286 (1950). As explained in Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946), "[j]ury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to democratic ideals of trial by jury."

Accordingly, the Court has struck down a variety of practices over the years that have

the effect of producing racially skewed juries, regardless of whether that effect is commanded by law or achieved through trial practice. In either event, "[f]or racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society." Smith v. Texas, 311 U.S. 128, 130 (1940).

Democracy rests on a belief in individual worth -- and individual autonomy -- that cannot be reconciled with racial stereotyping. Thus, in Norris v. Alabama, 294 U.S. 587 (1935), the Court reversed a rape conviction arising from the notorious prosecution of the "Scottsboro boys" upon a showing that no black had ever served upon either a grand or petit jury in the trial county, notwithstanding the fact that this discriminatory result was not mandated by

statute. Quoting an earlier decision in Carter v. Texas, 177 U.S. 442, 447 (1900), the Norris Court said:

> Whenever by any action of a State, whether through its legislature, through its court, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied him, contrary to the Fourteenth Amendment of the Constitution of the United States.

294 U.S. at 589. The Court then added that this principle of equality "is equally applicable to a similar exclusion of negroes from service on petit juries." Id.

Avery v. Georgia, 345 U.S. 559 (1953), illustrates the rigorous scrutiny applied by the Court to jury selection procedures when an allegation of discrimination is supported by the record. In Avery, prospective jurors had their names printed on tickets -- white

jurors on white tickets and black jurors on yellow tickets. The tickets were then placed in a box and a judge drew out the required number. These were given to the sheriff, who in turn handed them to the clerk, who typed up the final list of the jury panel. Although it was difficult to pinpoint at what stage in this process racial screening took place, the end result was that an all white panel of sixty jurors was selected to serve in defendant's case. The Court considered the exact moment of discrimination a constitutional irrelevancy. Id. at 562.

The Court's insistence on non-discrimination in jury selection has always rested on the recognition that a jury chosen through discriminatory procedures harms not only the accused, but "society as a whole." Rose v. Mitchell, 443 U.S. 545, 556 (1979). In Justice Blackmun's words:

It is clear from the earliest

> cases applying the Equal Protection Clause in the context of racial discrimination in the selection of a . . . jury, that the Court from the first was concerned with the broad aspects of racial discrimination that the Equal Protection Clause was designed to eradicate, and with the fundamental social values the Fourteenth Amendment was adopted to protect, even though it addressed the issue in the context of reviewing an individual criminal conviction.

Id. at 555.

The requirement of a jury drawn from a representative cross-section of the community similarly responds to broad social concerns. On the one hand, it undeniably enhances the capacity of the jury as a fact-finding body.

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from a jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives

> the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Peters v. Kiff, 407 U.S. 493, 503-04 (1972). See also Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting).

The factfinding ability of a jury may be impaired even though each of its members is sincerely impartial. This impairment is perhaps most obvious in a case like McCray's, where the prosecution's evidence rests entirely on an eyewitness identification. Studies have consistently shown that cross-racial identifications are notoriously suspect.[7] It does not require extensive citation to appreciate that the possibility

7. See E. Loftus, EYEWITNESS TESTIMONY (1979); Malpass and Kravitz, "Recognition for Faces of Own and Other Race," 31 J. Personality and Social Psychology 330 (1979).

of a white victim misidentifying a black youth on an urban street corner three weeks after a crime may be more readily understood by black jurors than white jurors.

Moreover, the process of group decision-making that is inherent in jury deliberation is necessarily diminished by the deliberate exclusion of cognizable groups. "[T]he counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case." Ballew v. Georgia, 435 U.S. 223, 234 (1978).

At the same time, the fair cross-section requirement promotes important interests separate and distinct from the jury's fact-finding function. Those interests relate to the legitimacy of the jury as a social institution.

> There is good reason why public confidence in the integrity of the judiciary is diminished

> whenever invidious prejudice seeps into its processes. This diminution of confidence largely stems from a recognition that the institutions of criminal justice serve purposes independent of accurate factfinding. These institutions also serve to exemplify, by the manner in which they operate, our fundamental notions of fairness and our central faith in democratic norms.

Hobby v. United States, ___ U.S. ___, 82 L.Ed.2d 260, 271 (1984) (Marshall, J., dissenting)(footnote omitted).

Thus, almost forty years ago, in Ballard v. United States, 329 U.S. 187, 193-94 (1946), the Court refused to accept the perpetuation of all male juries in federal court although acknowledging that the presence of women on the jury "may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded."

This point was highlighted by Congress when it adopted the Federal Jury Selection

and Service Act of 1968,[8] which adopts the fair cross-section requirement as "the policy of the United States." The House Report notes:

> It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross-sectional goal, biased juries are the result -- biased in the sense that they reflect a slanted view of the community they are supposed to represent.

H.R.Rep. No. 1076, 90th Cong., 2d Sess. 8 (1968), quoted in Taylor v. Louisiana, 419 U.S. 522, 529 n.7 (1975).

The fair cross-section requirement has its roots in this Court's early Fourteenth Amendment jurisprudence. See generally, Peters v. Kiff, 407 U.S. at 500 n.9. More recent cases, however, have pointed to the

---

8. Pub.L. 90-274, 82 Stat. 53, 28 U.S.C. §1861.

Sixth Amendment as the source of the fair cross-section requirement. Most notably, in Taylor, the Court relied on the Sixth Amendment to support its holding "that the American concept of a jury trial contemplates a jury drawn from a fair cross-section of the community." 419 U.S. at 527. Accord, Williams v. Florida, 399 U.S. 78 (1970).

Swain, of course, was decided prior to the application of the Sixth Amendment's jury clause to the states in Duncan v. Louisiana, 391 U.S. 145 (1968). Taylor was decided seven years after and it thus represents a judgment by this Court that the fair cross-section requirement is fundamental to the jury trial right protected by the Sixth Amendment. Cf. Johnson v. Louisiana, 406 U.S. 356, 373 (1972)(the Fourteenth Amendment incorporates "the essentials" of the Sixth Amendment's jury trial guarantee)(Powell, J., concurring).

As a fundamental attribute of the jury trial right, the fair cross-section requirement has never been limited by this Court to the jury venire. For example, in Ballew v. Georgia, 435 U.S. 223 (1978), this Court held that a five person jury was too small to represent the community's judgment in a meaningful way -- in part because a five person jury threatened "the representation of minority groups in the community," id. at 236 -- although there is no indication that the jury venire was in any way defective or unrepresentative.

Similarly, in Witherspoon v. Illinois, 391 U.S. 510 (1968), the Court struck down a legislative scheme that permitted the prosecution to challenge for cause any potential juror opposed to the death penalty. In Witherspoon, as in Ballew, the concern focused clearly on the jury panel rather than the jury venire. See generally McCray v.

Abrams, 750 F.2d at 1129.

That focus is plainly correct. The point of demanding a representative jury pool is to maximize the chance of obtaining a representative jury. The intentional exclusion of prospective jurors on the basis of race, whether in the process of compiling a jury pool or selecting a jury, is equally destructive of this constitutional goal. See United States v. Childress, 715 F.2d 1313, 1319 (8th Cir. 1983)(en banc), cert. denied, ___ U.S. ___, 104 S.Ct. 744 (1984)("The extension of Taylor v. Louisiana from the venire to the petit jury has much logical and practical appeal").[9]

9. Another goal of the fair cross-section requirement recognized in Taylor is to promote "public confidence in the fairness of the criminal justice system." 419 U.S. at 530. Such confidence is unlikely to be felt by a minority community which observes the systematic exclusion of every black juror through the prosecutor's use of peremptory challenges.

This does not suggest, as some lower courts have erroneously assumed,[10] that the jury chosen in any particular case must faithfully duplicate the ethnic composition of the community at large. "Defendants are not entitled to a jury of any particular composition . . . ." Taylor v. Louisiana, 419 U.S. at 538. But the constitutional imperative of an impartial jury drawn from a fair cross-section of the community that Taylor endorsed is undeniably frustrated by the prosecutor's use of peremptory challenges to exclude potential jurors on the basis of race alone.

"When the prosecution employs its peremptory challenges to remove from jury participation all Negro jurors, the right

10. Cf. People v. Payne, 457 N.E.2d 1202, 1203-04 (Ill. 1983).

guaranteed in Taylor is denied just as effectively as it would be had Negroes not been included on the jury rolls in the first place." Harris v. Texas, ___ U.S. ___, 82 L.Ed.2d 858 (1984)(Marshall, J., dissenting from the denial of certiorari). As one commentator has aptly observed: "Random unrepresentativeness . . . is certainly different from the intentional destruction of representativeness." Comment, The Prohibition of Group-Based Stereotypes in Jury Selection Procedures, 25 Vill.L.Rev. 339, 356 (1979).

In his first inaugural address, Thomas Jefferson listed "trial by juries impartially selected" as one of the defining liberties of American life. This Court has upheld that right over and over again for one hundred years. See Ex Parte Virginia, 100 U.S. 339 (1880); Neal v. Delaware, 103 U.S. 370 (1881); Bush v. Kentucky, 107 U.S. 110

(1883): Rogers v. Alabama, 192 U.S. 226 (1904): Hollins v. Oklahoma, 295 U.S. 394 (1935): Hale v. Kentucky, 303 U.S. 613 (1938): Pierre v. Louisiana; 306 U.S. 354 (1939): Hill v. Texas, 316 U.S. 400 (1942): Thiel v. Southern Pacific Co., 328 U.S. 217 (1946): Patton v. Mississippi, 332 U.S. 463 (1947): Hernandez v. Texas, 347 U.S. 475 (1954): Whitus v. Georgia, 385 U.S. 545 (1967): Carter v. Jury Commission, 396 U.S. 320 (1970): Turner v. Fouche, 396 U.S. 346 (1970): Alexander v. Louisiana, 405 U.S. 625 (1972): Peters v. Kiff, 407 U.S. 493 (1972): Castaneda v. Partida, 430 U.S. 482 (1977).

Occasionally, the Court has relied on concepts of equality; occasionally, it has cited the representative function of the jury. On the issue of ultimate principle, however, the Court has never wavered. "If there has been discrimination [in jury selection], whether accomplished ingeniously

or ingenuously, the conviction cannot stand." Smith v. Texas, 311 U.S. at 132.

B. The Premises of Swain

Swain emphatically rejects the constitutionality of race discrimination and thus, on its face, is fully consistent with the judicial tradition recited above. As Swain properly notes, "the soundness of these principles . . . is unquestioned . . . ." 380 U.S. at 205. "[A] State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause," id. at 203-04, and after Taylor, such purposeful exclusions violate the Sixth Amendment as well.

Nevertheless, Swain holds that a prosecutor's use of peremptory challenges in a particular case is immune from constitutional inquiry no matter how egregious, 380 U.S. at

222. To prevail under Swain, a defendant must introduce statistical evidence establishing a pattern and practice of racial exclusions in a given jurisdiction over a period of time. Swain does not define a precise quantum of evidence necessary to make out a prima facie case. But lower courts faced with that problem have understandably reacted to the fact that in Swain itself six members of this Court found the evidence lacking despite proof that no black had ever served on a grand or petit jury in the history of Talledega County.

The approach adopted by Swain differs dramatically from the normal rule in discrimination cases. For example, this Court has never held that an employee must use statistics in order to prove job discrimination. Nor has this Court ever held that statistics are an indispensable ingredient in housing discrimination cases. Discrimination

may be triggered by group membership, but the right to be free of discrimination is an individual right. Thus, "[T]he Fourteenth Amendment requires that equal protection to all must be given -- not merely promised." Smith v. Texas, 311 U.S. at 130.

Swain sidesteps this injunction by holding that the disqualification of blacks from criminal juries on racial grounds is not discrimination; rather, Swain defines such action as the permissible consequence of an admittedly arbitrary system designed in the end to secure impartial juries and promote public confidence in the jury system. Elaborating on this point, Swain explains that peremptory challenges are "frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty." 380 U.S. at

220.

It is, at best, an odd definition of discrimination that does not include the purposeful exclusion of otherwise qualified individuals from jury service solely because of their race. Clearly, a practice does not become more or less discriminatory because it is longstanding. And the fact that potential jurors are subject to peremptory challenge because of their occupation or organizational affiliation is simply not equivalent in constitutional terms to the disqualification of jurors on the basis of race.

As a society we have made the profound choice not to divide the world along certain lines. The use of race as a criterion for jury selection is no less discriminatory because it is accomplished through the exercise of peremptory challenges than through some other manipulation of the jury selection procedure.

According to Swain, "[i]n the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause." Id. at 221. But if blacks, whites, Protestants and Catholics are all being struck from the jury in a seemingly random and arbitrary pattern, there is no valid claim of discrimination. Conversely, if only blacks or only whites or only Protestants or only Catholics are being struck as a group, then there are at the least legitimate grounds for further inquiry.

Amici concede that in a given case, a potential juror's race or religion may give rise to a more searching voir dire. And it is equally true that the right to disqualify a juror whose racial bias is "felt" even though it cannot be proved is an important right. Compare Ham v. South Carolina, 409 U.S. 524 (1973), with Ristaino v. Ross, 424

U.S. 589 (1976). But when juror after juror is excused by the state in a particular case, not because of any actual or perceived bias related to the specific case but because of an automatic assumption that black jurors will not fairly judge a black defendant no matter what, then a constitutional line has been crossed from merely arbitrary state action to forbidden discrimination.

Swain does not deny that the racial use of peremptory challenges can severely distort the representative quality of a particular jury in a way that American society and constitutional jurisprudence now refuse to tolerate in almost every other context. Rather, Swain suggests that race may be a relevant factor in selecting an impartial jury, and that the selection of an impartial jury is a higher value than non-discrimination in the criminal justice system. Taylor, however, emphatically

rejects the use of the racial and sexual stereotypes in jury selection.

Race qua race is not a relevant criterion in selecting an impartial jury. At best, it offers a rough approximation of more relevant criteria, such as background and experience. "[T]he Constitution recognizes higher values than speed and efficiency," however. Stanley v. Illinois, 405 U.S. 645, 656 (1972). As this Court stated in Taylor, "the administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials." 419 U.S. at 535.

To exclude all black jurors because some black jurors may be affected by racial sympathies is not fundamentally different than excluding all women from certain occupations because some women may not be strong enough to perform the job. Indeed, it

is even worse since the quality of most jobs presumably does not depend on whether they are performed by a man or a woman. A jury, on the other hand, cannot perform its community function if it is purposefully stripped of its representative character.

Swain's assumption that whites as well as blacks are the potential victims of this discrimination hardly validates the practice. Moreover, as the Second Circuit correctly recognized in McCray v. Abrams, 750 F.2d at 1121, "[i]n most communities a majority of those eligible for jury duty are white; and as a practical matter, the prosecution does not peremptorily excuse whites simply because they are whites."

There is no doubt that peremptory challenges play a valuable role in assuring fairness in the trial process. There is also no doubt that the decision in Swain was prompted by a strong desire to preserve the

peremptory challenge system. There is absolutely no indication in Swain, however, that a majority of this Court meant to condone racial discrimination in jury selection or anticipated that Swain would, in fact, encourage such discrimination. Nor is there any reason for this Court to adhere to a rule that promotes discrimination when other alternatives exist that are equally capable of preserving the beneficial features of peremptory challenges without running the risk of discriminatory abuse that Swain entails.

C. The Impact of Swain

Swain would not be subject to the criticism it has engendered if its evidentiary standard had proved an effective device for rooting out discrimination in jury selection. After two decades, however, it is abundantly clear that Swain created instead a "mission impossible" for criminal defendants

who allege discrimination in the prosecutor's use of peremptory challenges. McCray v. Abrams, 750 F.2d at 1120. The result has been to breed cynicism rather than respect for the criminal justice system.

McCray's impossible plight in seeking to satisfy Swain is fairly typical. There are no available statistics that document the pattern of peremptory challenges by the Kings County prosecutor. Thus, to meet the Swain test, McCray would have to transcribe enough voir dire proceedings to create a statistically significant sample, assuming that a significant number of voir dires are even recorded.[11] The time and expense involved in that undertaking are evident. Even then, there is no assurance that the transcripts

11. Many voir dires, including McCray's, are conducted without a stenographer present.

would be helpful since the race of prospective jurors is often not revealed during voir dire. Furthermore, all of this discovery must be accomplished virtually overnight since its need does not arise until a defendant's own jury selection is already underway.[12] Most fundamentally, Swain offers no possibility of relief to the first victim of discriminatory jury selection in a jurisdiction. Cf. Oklahoma City v. Tuttle, 53 U.S.L.W. 4639, 4645 (1985)(Brennan J., concurring)("A §1983 cause of action is as available for the first victim of a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right as it

12. The complexity of the statistical case required by Swain is fully described in Winick, "Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis," 81 Mich.L.Rev. 1, 21-39 (1982).

is for the second and subsequent victims").

These difficulties have proved largely insurmountable. According to one published report, not a single defendant was able to satisfy Swain in the decade following the Supreme Court's decision. Annot., "Use of Peremptory Challenge to Exclude from Jury Persons Belonging to a Class or Race," 79 A.L.R.3d 14, 24 (1975). Amici has discovered only two cases in which Swain's evidentiary burden has ever been met. See State v. Brown, 371 So.2d 751 (La. 1979); State v. Washington, 375 So.2d 1162 (La. 1979).[13]

13. In United States v. Newman, 549 F.2d 240 (2d Cir. 1977), the Second Circuit reversed a statistical finding that the pattern of peremptory challenges by the United States Attorney in the District of Connecticut had reached "an excessive point." Judge Anderson's opinion disagreed with the methodology used by the district court.

This judicial phenomenon can be explained in only two ways. Either peremptory challenges are not being used to screen potential jurors on the basis of race or Swain inadvertently condoned a discriminatory practice it meant to condemn. The evidence strongly supports the latter interpretation. See generally J. Van Dyke, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS (1977).

In dissenting from the original denial of certiorari in McCray's case, Justice Marshall offered a catalogue of cases in which Swain had proved an insurmountable barrier "despite proof that unmistakably creates an inference of racial discrimination." 103 S.Ct. at 2441 n.4.

For example, in United States v. Carter, 528 F.2d 844 (8th Cir. 1975), cert. denied, 425 U.S. 961 (1976), the evidence showed that 81% of all blacks available to serve on petit

juries in 15 criminal cases tried during 1974 had been excluded by the prosecutor's peremptory challenges, and that the prosecutor had excluded all potential black jurors in seven of those cases. Defendant's claim under Swain was nonetheless denied and the prosecutor was never required to justify his conduct in non-racial terms.

One year later, in United States v. Nelson, 529 F.2d 40 (8th Cir. 1976), another defendant in the same jurisdiction again established that the prosecutor had used his peremptory challenges to bar all blacks in his case. This time the court expressed "concern" about the prosecutor's actions but was unwilling to grant defendant a new trial. Instead, the prosecutor was warned that in future cases "appropriate action" might be taken by district judges in the exercise of their supervisory powers. 529 F.2d at 43.

The evidence of discriminatory intent

was even more direct in United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971). There, the prosecutor's own notes recorded the race of defendants he had tried during a one week period, the number of blacks on the jury panel and the number of blacks excluded through the prosecutor's peremptory challenges. Based on this record, the court accepted defendant's "reasonable conclusion" that the prosecutor was engaged in a deliberate effort to exclude as many black jurors as possible whenever the defendant was black. Still, the court held, this showing did not suffice under Swain.

Indeed, Swain motions are routinely denied even when statistical proof is reinforced by anecdotal evidence. In Ridley v. State, 475 S.W.2d 769 (Tex.Crim.App. 1972), the prosecutor used seven peremptory challenges to exclude potential black jurors. To buttress his claim under Swain, defendant

presented testimony from local attorneys that documented the prosecutor's systematic use of peremptory challenges to create all white juries in cases involving black defendants and white victims. Defendant also produced an admission from an assistant district attorney that peremptory challenges were regularly used in this discriminatory manner. Yet his claim under Swain was denied by the court. See also Harris v. Texas, ___ U.S. ___, 82 L.Ed.2d 858, 859 (1984)(Marshall, J., dissenting from the denial of certiorari).

Given the inherently arbitrary nature of peremptory challenges, no constitutional rule can eliminate entirely the potential for abuse by a prosecutor intent on purging the jury in a discriminatory fashion. But Swain leaves concerned trial judges with no remedy to eradicate discrimination in their courtrooms. See e.g. People v. Thompson, 79

A.D.2d 87, 435 N.Y.S.2d 739, 743 (2d Dept. 1981).

The difficulties with the Swain approach, and the results it produces, have been apparent for some time. From the beginning, Swain has been strongly criticized by most legal commentators.[14] In recent years it has been rejected by four different states in construing their own constitutions. People v. Wheeler, 22 Cal.3d 258, 583 P.2d

14. E.g. Winick, supra n.12; Brown, McGuire & Winters, "The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse," 14 New Eng.L.Rev. 192 (1978); Comment, "The Prosecutor's Exercise of the Peremptory Challenge to Exclude Non-White Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause," 46 U.Cin.L.Rev. 554 (1977); Note, "Limiting the Peremptory Challenge: Representation of Groups on Petit Juries," 86 Yale L.J. 1715 (1977). Other critical commentary is cited in Justice Marshall's dissenting opinion in McCray's case. 103 S.Ct. at 2439 n.1.

748 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979); State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980); State v. Neil, 457 So.2d 481 (Fla. 1984).

In addition, two federal circuits have now distinguished Swain. In McCray, the Second Circuit relied exclusively on the Sixth Amendment to "conclude that a defendant may appropriately subject to scrutiny . . . the prosecution's use of its peremptory challenges on the basis of its actions in his own particular case." 750 F.2d at 1131. In United States v. Leslie, No. 83-3719, ___ F.2d ___ (5th Cir. April 10, 1985), the Fifth Circuit cited its supervisory authority to prohibit federal prosecutors within its jurisdiction from exercising peremptory challenges on the basis of race.

While not departing from Swain, the Ninth Circuit has strived to circumscribe the

effect of Swain, ruling in Weathersby v. Morris, 708 F.2d 1493, 1496 (9th Cir. 1983), that "a court need not blind itself to the obvious . . . ." when a prosecutor admits utilizing peremptory challenges on the basis of race. The Eighth Circuit has questioned Swain in the process of following it. United States v. Childress, 715 F.2d 1313 (8th Cir. 1983)(en banc), cert. denied, 104 S.Ct. 744 (1984).

All of this scholarly and judicial analysis has done more than just reveal the flaws of Swain. It has demonstrated in the crucible of actual criminal trials that an alternative to Swain is both feasible and fair. It has done so, moreover, without losing sight of Swain's dual goals -- eliminating racial discrimination in the criminal justice system and preserving the value of peremptory challenges as a method of juror disqualification separate and distinct

from challenges for cause.

In Bell v. Hood, 327 U.S. 678, 684 & n.6 (1946), this Court wrote: "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." To grant the necessary relief when peremptory challenges are used by the prosecution for discriminatory purposes, the rule in Swain must now be modified.

D. An Alternative to Swain

As previously mentioned, Swain has now been modified by four states and two federal circuits. United States v. Leslie, supra; McCray v. Abrams, supra; State v. Neil, supra; State v. Crespin, supra; Commonwealth v. Soares, supra; People v. Wheeler, supra. In all these instances, the modification of Swain has been essentially the same.

Under the so-called Wheeler rule first announced by the California Supreme Court, the exercise of peremptory challenges in any given case is presumed to be valid. But unlike Swain, that presumption can be rebutted by a showing that prospective jurors are being challenged "because of their group association rather than because of any specific bias." 22 Cal.3d at 280. Among the relevant factors identified by Wheeler in making that showing are whether all or most of an identifiable group have been excluded from jury service, whether a disproportionate number of peremptories have been used against a specific group and whether members of that group have been excused with little or no questioning. If a prima facie case is made, the burden shifts and the prosecutor must offer some reason for the peremptory challenges other than group bias. The burden is a minimal one, however, and "need not rise to

the level of a challenge for cause." 22 Cal.3d at 281-82.[15]

This analytic model is a familiar one in discrimination law, e.g. McDonnell Douglas v. Green, 411 U.S. 792 (1973), and it has been applied by this Court in jury discrimination cases following Swain. See Castaneda v. Partida, 430 U.S. 482, 494 (1977); Alexander v. Louisiana, 405 U.S. 625, 632 (1972).

The elements of a prima facie case in the peremptory challenge context are illustrated by the facts of McCray. The only

15. The Second Circuit adopted a roughly equivalent rule in McCray, holding that a defendant can establish a prima facie case by showing, first, that the group allegedly excluded from jury service is a "cognizable group in the community," 750 F.2d at 1131-32, and second, a "substantial likelihood" that the challenged exclusions were based on group membership rather than individual biases. Id.

eight minorities in the jury pool were challenged peremptorily by the prosecution; no minorities were eliminated by the defense, either through peremptory challenges or challenges for cause. Moreover, as McCray's counsel pointed out in a timely objection, there was no discernible reason for several of the peremptory challenges. To the contrary, at least one minority juror was excused despite indications during voir dire that he was likely to be sympathetic to the prosecution. And significantly, this pattern of peremptory challenges came on the heels of a hung jury, whose minority members had voted for acquittal.

Based on the record in McCray's case, neither the district court nor the Second Circuit had any difficulty concluding that "McCray's showing was ample to shift the burden of coming forward with some reason other than group affiliation for the

challenges." 750 F.2d at 1133. Once the burden shifts, the prosecution's explanation "of its legitimate reasons must be clear and reasonably specific." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981). "[A] simple protestation . . . that racial considerations played no part in the selection would [not] be enough." Castaneda v. Partida, 430 U.S. at 498 n.19 (and cases cited therein).[16]

The reported decisions from California and elsewhere do not reveal any disruption in the system of peremptory challenges as a result of the Wheeler rule. Indeed, in the

16. The unwillingness to accept "a simple protestation" of innocence in jury discrimination cases suggests a shift in the burden of persuasion as well as the burden of production. This is entirely appropriate. Otherwise, a prosecutor's pretextual explanation would almost always prevail, since under the Wheeler/McCray scheme, the criminal defendant has neither the advantage of discovery nor the opportunity for rebuttal. Compare Burdine, 450 U.S. at 258.

seven years since Wheeler was decided, the issue seems to have reached the California appellate courts in fewer than a dozen cases.

The paucity of appellate decisions is not surprising. Most prosecutors will comply with their legal obligation to exercise peremptory challenges in a racially neutral way once those obligations are clarified. For those few prosecutors who do overstep proper bounds, the constitutional remedy will generally occur at the trial court level and involve little more than a new beginning to jury selection. Obviously, there are transactional costs whenever jury selection is interrupted. But those costs are relatively small and cannot be compared with the constitutional injury inflicted by a discriminatory jury selection. See Taylor v. Louisiana, 419 U.S. at 535 ("the administrative convenience in dealing with women as a class is insufficient justification for

diluting the quality of community judgment represented by the jury in criminal trials").

Thus, the California Supreme Court recently found that Wheeler had been both effective and workable. People v. Hall, 35 Cal.3d 161, 672 P.2d 854, 859 & n.11 (1983). Reinforcing that view, the prosecutor in McCray has asserted that a Wheeler-type rule could be implemented in New York without significant disruption in the criminal justice system. Her views in this regard, as the district attorney of New York's most populous county, are entitled to respect.

Any deviation from the bright line of Swain undoubtedly raises certain line-drawing problems. See McCray v. New York, 103 S.Ct. at 2439 n.* (Stevens, J., concurring in the denial of certiorari). However, the clarity of Swain derives from the fact that it is unwilling to question the use of peremptory challenges in a given case no matter how

apparent the prosecutor's discriminatory actions may be. Wheeler and its progeny, including McCray, amply demonstrate that such judicial passivity in the face of racial discrimination is both unnecessary and unwise.

Nor should this Court be deterred by the claim that a modification of Swain will present insuperable problems in classifying groups as sufficiently cognizable or not to trigger the fair cross-section requirement. Similar objections were considered and dismissed in Hernandez v. Texas, 347 U.S. 475 (1954), which held that persons of Mexican descent could not be systematically excluded from Texas criminal juries.

Hernandez ends with the following justification of its conclusion:

> To say that this decision revives the rejected contention that the Fourteenth Amendment requires proportional representation of all the component

> ethnic groups of the community on every jury ignores the facts. The petitioner did not seek proportional representation, nor did he claim a right to have persons of Mexican descent sit on the particular juries which he faced. His only claim is the right to be indicted and tried by juries from which all members of his class are not systematically excluded -- juries selected from among all qualified persons regardless of national origin or descent. To this much, he is entitled by the Constitution.

347 U.S. at 482 (footnotes omitted).

The Constitution requires as much in the present case. Whatever subtleties may remain to be resolved in future cases, our constitutional heritage cannot be reconciled with a rule of law that permits a public prosecutor to bar potential jurors from performing one of democracy's most sacred functions solely on account of their race. With twenty years experience, Swain's flaws are too apparent to be further ignored. Its

remedial approach to the problems of discrimination in peremptory challenges must now be modified in order to uphold the principles of racial equality that Swain itself so eloquently affirms.

CONCLUSION

Two years ago, three members of this Court suggested that the issues presented by this case should be further examined in the laboratory presented by the lower state and federal courts. As part of that experiment, and one of a growing number of courts departing from Swain, the Fifth Circuit recently wrote: "Ugly in its practice and insidious in its effect, invidious racial discrimination deserves protection in no area of society, least of all in the administration of justice in the federal courts." United States v. Leslie, supra, slip op. at 3955.

Amici concur in that judgment. The use of race-based peremptory challenges has simply become an expedient way to accomplish indirectly what can no longer be achieved

through the direct and open exclusion of minority group members from the criminal justice system. In a multitude of other contexts, this Court has forbidden such end runs around the Constitution. Likewise in this case, the anomalous loophole that Swain produced should finally be closed.

For the reasons stated herein, amici urge reversal of the decision below.

Respectfully submitted,

Steven R. Shapiro

Steven R. Shapiro
New York Civil Liberties Union
132 West 43 Street
New York, NY 10036
(212) 382-0557

Attorney for amici curiae

Dated: New York, NY
June 21, 1985

(3)

No. 84-6263

Office-Supreme Court, U.S.
FILED
JUN 25 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES KIRKLAND BATSON,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Kentucky

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

FRED N. FISHMAN
ROBERT H. KAPP
Co-Chairmen
NORMAN REDLICH
Trustee
WILLIAM L. ROBINSON
NORMAN J. CHACHKIN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
Suite 400
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212

BARRY SULLIVAN
Counsel of Record
RICHARD P. STEINKEN
MICHAEL T. BRODY
JENNER & BLOCK
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Attorneys for Amicus Curiae

BEST AVAILABLE COPY

37 pp

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
STATEMENT	2
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT:	
I. THE USE OF PEREMPTORY CHALLENGES TO EXCLUDE MEMBERS OF A RACIAL GROUP FROM JURY SERVICE IN AN INDIVIDUAL CASE VIOLATES BOTH THE SIXTH AND FOURTEENTH AMENDMENTS	7
A. The Use of Peremptory Challenges to Exclude Members of a Racial Group from Jury Service Violates the Sixth Amendment	7
B. The Use of Peremptory Challenges to Exclude Members of a Racial Group from Jury Service Violates the Equal Protection Clause of the Fourteenth Amendment	11
II. STATE AND FEDERAL COURTS HAVE DEVELOPED A WORKABLE ALTERNATIVE TO *SWAIN* WHICH PROTECTS THE CONSTITUTIONAL RIGHTS OF CRIMINAL DEFENDANTS AND PRESERVES THE DISCRETION OF PROSECUTORS IN EXERCISING PEREMPTORY CHALLENGES	17

A. State and Federal Courts Have Developed a Rule Which More Effectively Balances the Competing Concerns Identified in *Swain* 18

B. The *Wheeler* Rule is Necessary to Ensure the Constitutional Exercise of Peremptory Challenges 20

CONCLUSION 25

APPENDIX A A-1

TABLE OF AUTHORITIES

Cases	PAGE
Adams v. Texas, 448 U.S. 38 (1980)	10
Alexander v. Louisiana, 405 U.S. 625 (1972)	3, 5, 12, 14
Apodaca v. Oregon, 406 U.S. 404 (1972)	13
Avery v. Georgia, 345 U.S. 559 (1953)	3, 12
Ballard v. United States, 329 U.S. 187 (1946) ..	12
Ballew v. Georgia, 435 U.S. 223 (1978)	9
Board of Regents v. Roth, 408 U.S. 564 (1972) ..	24
Bordenkircher v. Hayes, 434 U.S. 357 (1978) ..	24
Carter v. Jury Commission, 396 U.S. 320 (1970) .	9
Cassell v. Texas, 339 U.S. 282 (1950)	3
Castaneda v. Partida, 430 U.S. 482 (1977)	12
Commonwealth v. Brown, 11 Mass. App. Ct. 288, 416 N.E.2d 218 (1981)	22

Commonwealth v. Gagnon, 16 Mass. App. Ct. 110, 449 N.E.2d 686 (1983), *rev'd sub nom., Commonwealth v. Bourgeois*, 391 Mass. 869, 465 N.E.2d 1180 (1984) 22

Commonwealth v. Martin, 461 Pa. 289, 336 A.2d 290 (1975) 16

Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979) . 20, 22

Connecticut v. Teal, 457 U.S. 440 (1982) 14

Davis v. Georgia, 429 U.S. 122 (1976) (per curiam) . 10

Duncan v. Louisiana, 391 U.S. 145 (1968) 4, 7, 8

Ex parte Virginia, 100 U.S. 339 (1880) 12

Gibson v. Mississippi, 162 U.S. 565 (1896) 12

Hernandez v. Texas, 347 U.S. 475 (1954) 12

Hoyt v. Florida, 368 U.S. 57 (1961) 4, 8

Jones v. Georgia, 389 U.S. 24 (1967) 14

Lane v. Wilson, 307 U.S. 268 (1939) 11

McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), *petition for cert. filed*, No. 84-1426 (March 4, 1985) 10, 16, 20

McCray v. New York, 461 U.S. 961 (1983) 15, 21

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 6

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) 5, 24

People v. Allen, 23 Cal. 3d 286, 590 P.2d 30 (1979) . 21

People v. Fuller, 136 Cal. App. 3d 403, 186 Cal. Rptr. 283 (1982) 22

People v. Hall, 35 Cal. 3d 161, 672 P.2d 854 (1983) . 21, 22

People v. McCray, 57 N.Y.2d 542, 443 N.E.2d 915 (1982), *cert. denied*, 461 U.S. 961 (1983) 20

People v. Mack, 27 Cal. 3d 145, 611 P.2d 454 (1980) 21

People v. Payne, 106 Ill. App. 3d 1034, 436 N.E. 2d 1046 (1982), *rev'd*, 99 Ill. 2d 135, 457 N.E.2d 1202 (1983), *cert. denied*, 105 S. Ct. 447 (1984) .. 20

People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981), *overruled by People v. McCray*, 57 N.Y.2d 542, 443 N.E.2d 915 (1982), *cert. denied*, 461 U.S. 961 (1983) 20

People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748 (1978) ..... *passim*

Peters v. Kiff, 407 U.S. 493 (1972) 3, 10, 12

Reddick v. Commonwealth, 381 Mass. 398, 409 N.E.2d 764 (1980) 21

Smith v. Texas, 311 U.S. 128 (1940) 12

State v. Crespin, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980) 20, 23

State v. Davis, 99 N.M. 522, 660 P.2d 612 (Ct. App. 1983) 23

State v. Gilmore, 199 N.J. Super. 389, 489 A.2d 1175 (Super. Ct. App. Div. 1985) 20

State v. Neil, 457 So. 2d 481 (Fla. 1984) 20

Strauder v. West Virginia, 100 U.S. 303 (1880) 3, 12, 17

Swain v. Alabama, 380 U.S. 202 (1965) ..... *passim*

Taylor v. Louisiana, 419 U.S. 522 (1975) 4, 8

Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) . 9, 12

United States v. Leslie, 759 F.2d 366, *reh'g en banc granted*, 759 F.2d 366 (5th Cir. 1985) 20

Wayte v. United States, 105 S. Ct. 1524 (1985) .. 24

Whitus v. Georgia, 385 U.S. 545 (1967) 14

Williams v. Florida, 399 U.S. 78 (1970) 8

Witherspoon v. Illinois, 391 U.S. 510 (1968) ... 9

Rule

Supreme Court Rule 36.2 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-6263

JAMES KIRKLAND BATSON,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Kentucky

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

STATEMENT OF INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963, at the request of the President of the United States, to involve private attorneys in the national effort to assure the civil rights of all Americans.

During the past 22 years, the Lawyers' Committee and its local affiliates have enlisted the services of thousands of members of the private bar in addressing the legal problems of minorities and the poor. The Committee's membership today includes past presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers. The importance of this case to the principle of equal justice under law, and the widespread perception of minority group members that prosecutors can exercise peremptory challenges in a discriminatory manner, have prompted the Lawyers' Committee to file this brief *amicus curiae* in support of petitioner. The parties have consented to the filing of this brief, which is therefore submitted pursuant to Supreme Court Rule 36.2.

STATEMENT

Petitioner James Kirkland Batson, a black man, was convicted by a Kentucky jury of second degree burglary and receipt of stolen property, based upon his alleged theft of two purses (J.A. 5). He was sentenced to 20 years' imprisonment (J.A. 5).

Although the venire in petitioner's case included four blacks, the Commonwealth used four of its six peremptory challenges to exclude each of them (J.A. 2-3). Petitioner timely objected to this deployment of the Commonwealth's peremptory challenges, moved to discharge the jury panel, and later objected to the swearing of the jury (J.A. 2-4). The trial court overruled petitioner's objections, refused to inquire into the Commonwealth's reasons for striking all of the black veniremen, and refused even to determine whether the record showed a strong likelihood that the

Commonwealth had stricken the black veniremen solely because of their race (J.A. 3).

The Supreme Court of Kentucky affirmed petitioner's conviction (J.A. 9). The Supreme Court rejected petitioner's constitutional claim, based on the Commonwealth's exercise of its peremptory challenges, on the ground that petitioner had not satisfied the standard established by this Court in *Swain v. Alabama*, 380 U.S. 202 (1965) (J.A. 8).

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 100 years, this Court has consistently held that the Equal Protection Clause of the Fourteenth Amendment precludes the exclusion of blacks, based solely on their race, from service on grand and petit juries. *See, e.g., Peters v. Kiff*, 407 U.S. 493 (1972); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Avery v. Georgia*, 345 U.S. 559 (1953); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

In *Swain v. Alabama*, 380 U.S. 202 (1965), this Court noted the "unquestioned" soundness of that principle (*id.* at 205) and reaffirmed that " '[j]urymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race' " (*id.* at 204, *quoting Cassell v. Texas*, 339 U.S. 282, 286 (1950)). Thus, as the Court held in *Swain*, "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause" (380 U.S. at 203-04). Based, however, on

the perceived need to balance an individual's Fourteenth Amendment rights against the state's traditional discretion in exercising peremptory challenges, the Court also held that a criminal defendant could not establish a violation of the Fourteenth Amendment by proving that the state had practiced such discrimination in his individual case (*id.* at 221-22). In *Swain*, the Court held that a defendant could establish a violation of the Equal Protection Clause in this context only by proving that the state had a longstanding, systematic practice of deploying peremptory challenges to exclude members of particular racial groups from jury service (*id.* at 223-24).

Insofar as it creates a virtually irrebuttable presumption in favor of the state's exercise of peremptory challenges and limits the kind of proof which may be adduced to establish a constitutional violation in this context, the Court's holding in *Swain* is doctrinally unsound and must be overruled for at least three separate reasons. First, *Swain* is inconsistent with this Court's more recent decisions under the Sixth Amendment. In 1968, three years after *Swain* was decided, this Court held for the first time that the Sixth Amendment requirement of trial by an impartial jury applies to state prosecutions. *Duncan v. Louisiana*, 391 U.S. 145 (1968). Under the Sixth Amendment, as the Court later held in *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975), a criminal defendant is entitled to be tried by "a jury drawn from a fair cross section of the community." To withstand Sixth Amendment scrutiny, as the *Taylor* Court observed, the exclusion of a distinctive class from that cross-section must be justified by "weightier reasons" than the "merely rational grounds" sufficient to satisfy the equal protection standard (*id.* at 534). *Compare Taylor v. Louisiana*, 419 U.S. 522 (1975), *with Hoyt v. Florida*, 368 U.S. 57 (1961). Thus,

even if the *Swain* Court was correct in holding that the use of peremptory challenges to practice racial discrimination in an individual case does not violate the Equal Protection Clause of the Fourteenth Amendment, the same conduct clearly deprives a criminal defendant of his Sixth Amendment right to be tried by a jury drawn from a fair cross-section of the community.

Second, the equal protection analysis articulated in *Swain* is doctrinally unsound and inconsistent with this Court's more recent cases under the Fourteenth Amendment. The distinction posited in *Swain*—between systematic and individual discrimination—is analytically unsound because it confuses the separate and distinct questions of what constitutes a constitutional violation and how such a violation may be proved. Proof that discrimination has occurred in previous cases may indeed be probative of present discrimination, but the existence of present discrimination cannot be determined by reference only to historical practice. Because the right to be tried by an impartial jury is a personal right, a defendant is entitled to constitutional protection of that right even if the state has not previously denied it to others. *See, e.g., Alexander v. Louisiana*, 405 U.S. 625, 628-29 (1972).

Finally, the *Swain* Court erred in finding that respect for the historical nature of peremptory challenges precluded any inquiry into the racially discriminatory exercise of those challenges in an individual case. The balance struck by the Court in *Swain*, which elevates the goal of preserving the absolute discretion traditionally embodied in the peremptory challenge (without possibility of even the most minor alteration), in preference to the protection of individual constitutional rights, conflicts with the Court's more recent decisions in analogous areas involving similarly competing values. *See Mt. Healthy City*

School District Board of Education v. Doyle, 429 U.S. 274 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). A balance more consistent with this Court's recent cases was struck by the California Supreme Court in *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978). In *Wheeler*, the court held that where a defendant has established a *prima facie* case of discrimination in the use of peremptory challenges in an individual case, the state must show that the challenges were based on grounds reasonably relevant to the particular case, rather than on group bias. Only if the state's explanation is pretextual will the trial court dismiss the jurors already selected and begin the process anew. The *Wheeler* rule gives adequate protection both to the prosecutor's discretion and to individual constitutional rights; it is the logical and constitutionally mandated culmination of constitutional developments since *Swain*.

ARGUMENT

I.

THE USE OF PEREMPTORY CHALLENGES TO EXCLUDE MEMBERS OF A RACIAL GROUP FROM JURY SERVICE IN AN INDIVIDUAL CASE VIOLATES BOTH THE SIXTH AND FOURTEENTH AMENDMENTS.

In the 20 years since the Court decided *Swain v. Alabama*, 380 U.S. 202 (1965), the Court has consistently held that the Sixth Amendment applies to state as well as federal prosecutions. Thus, a state criminal defendant is constitutionally guaranteed the right to trial by an impartial jury of his peers drawn from a fair cross-section of the community. The use of peremptory challenges to exclude an identifiable class from jury service irreconcilably conflicts with that individual right. In addition, the law relating to racial discrimination has developed greatly in the past twenty years. Since *Swain*, this Court has consistently held that the Equal Protection Clause of the Fourteenth Amendment prohibits race-based discrimination against individuals; an individual's entitlement to relief cannot depend upon whether he stands first or last in a line of victims. Developments in both of these areas have eviscerated the doctrinal underpinnings of the rule announced in *Swain*.

A. The Use of Peremptory Challenges to Exclude Members of a Racial Group from Jury Service Violates the Sixth Amendment.

In 1968, three years after the Court's decision in *Swain*, the Court held that the Sixth Amendment requirement of trial by an impartial jury applies to state criminal prosecutions. *Duncan v. Louisiana*, 391 U.S. 145 (1968). The

Sixth Amendment right to trial by an impartial jury "contemplates a jury drawn from a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). *See Williams v. Florida*, 399 U.S. 78, 100 (1970). In *Taylor v. Louisiana*, this Court recognized that the "fair-cross-section requirement [is not only] fundamental to the jury trial guaranteed by the Sixth Amendment," but mandated by the basic purpose of the jury, which is "to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge" (419 U.S. at 530). *See also Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968).

The Court in *Taylor* also recognized that the Sixth Amendment right to a jury drawn from a representative cross-section of the community imposes restrictions on the exclusion of members of identifiable groups from jury participation, which are more stringent than those applicable under the equal protection standard articulated in *Swain*. Thus, the Court invalidated on Sixth Amendment grounds the conviction of a male defendant who had been tried by a jury selected from a venire from which most women had been excluded by statute. Just 14 years earlier, in *Hoyt v. Florida*, 368 U.S. 57 (1961), this Court had upheld a virtually identical statutory provision against an attack brought on due process and equal protection grounds, although, as Justice Rehnquist noted in *Taylor*, the earlier case presented "circumstances which were much more suggestive of possible bias and prejudice" (419 U.S. at 539 (Rehnquist, J., dissenting)). The Louisiana statute violated the Sixth Amendment because, as the *Taylor* Court explained, "[r]estricting jury service to only special groups or excluding identifiable segments playing major

roles in the community cannot be squared with the constitutional concept of jury trial" (419 U.S. at 530). The central principle was stated, albeit in a different context, almost 40 years ago: "Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class discriminations which are abhorrent to the democratic ideals of trial by jury." *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946). *See also Carter v. Jury Commission*, 396 U.S. 320, 330 (1970) (exclusions based on class or race "contravene[ ] the very idea of a jury—'a body truly representative of the community' ").

The Court has applied the more exacting standard of the Sixth Amendment, not only in the context of venire composition, but also with respect to actions affecting the jury selection process where the venire itself is deemed acceptable. In *Ballew v. Georgia*, 435 U.S. 223 (1978), the Court held that the Sixth Amendment prohibits the use of a five-person petit jury in a criminal misdemeanor trial. There was no suggestion in *Ballew* of an improper venire; nor was there any suggestion that the venire did not contain a fair cross-section of the community.[1] Similarly, in *Witherspoon v. Illinois*, 391 U.S. 510, 518 (1968), the Court held that a petit jury selected pursuant to a state law allowing the disqualification of veniremen opposed to the death penalty lacked "the impartiality to which the

[1] Although there was no majority opinion, six Justices found the jury system defective. Justice Blackmun, joined by Justice Stevens, noted that the size of the jury hindered achievement of the goal of the jury to "truly represent[ ] their communities" (435 U.S. at 239). Justice White concurred on the ground that a jury of less than six failed to satisfy the "fair cross-section requirement of the Sixth and Fourteenth Amendments" (435 U.S. at 245). Justice Powell, joined by the Chief Justice and Justice Rehnquist, noted that the jury size raised "grave questions of fairness" (435 U.S. at 245).

petitioner was entitled under the Sixth and Fourteenth Amendments." *See also Adams v. Texas*, 448 U.S. 38 (1980); *Davis v. Georgia*, 429 U.S. 122 (1976) (per curiam).

If the rights secured by the Constitution are to be effectively safeguarded, the exacting standard established by the Sixth Amendment must be applied to every stage of jury selection. Even in the face of this Court's decision in *Swain*, several state and federal courts have now concluded that the peremptory challenge cannot be used categorically to exclude members of racial groups from service as jurors in an individual case because that practice "restrict[s] unreasonably the possibility that the petit jury will comprise a fair cross section of the community." *McCray v. Abrams*, 750 F.2d 1113, 1129 (2d Cir. 1984), *petition for cert. filed*, No. 84-1426 (March 4, 1985). *See also* pages 18-20, *infra*. Indeed, the constitutional guarantee of an impartial jury, chosen from a fair cross-section of the community, would be illusory if the state were given a free hand to use peremptory challenges to bar blacks at the threshold to the jury box, and thus achieve the very same discrimination prohibited at all earlier stages of the jury selection process. Invidious discrimination is no less unconstitutional because it occurs at the eleventh hour. Regardless of when it occurs, the result is the same: a jury chosen in a manner which precludes even the possibility that it will reflect a fair cross-section of the community. This the Constitution does not permit, both because of the appearance of bias and because of the increased risk of actual bias in the decision of a particular case. *See Peters v. Kiff*, 407 U.S. 493, 502 (1972).[2]

[2] Many social scientists have documented both the tendency of prosecutors to exclude blacks from juries and the pro-prosecution effect such exclusions may have on a verdict, especially where the

(Footnote continued on following page)

The deployment of peremptory challenges to practice racial discrimination in a particular case cannot be tolerated because it violates the individual defendant's right to be free from official discrimination. The peremptory challenge cannot be deemed sacrosanct because the Sixth Amendment, like the Fifteenth, prohibits "sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (Frankfurter, J.).

B. The Use of Peremptory Challenges to Exclude Members of a Racial Group from Jury Service Violates the Equal Protection Clause of the Fourteenth Amendment.

Although the *Swain* Court reaffirmed the principle that racial discrimination can play no role in jury selection (380 U.S. at 204-05), the Court's holding—that an equal protection violation may be proved only through evidence of a long-standing and systematic pattern of discrimination—marks the case as an aberration in an otherwise unbroken line of jury selection cases that stretches back for more than 100 years of our history. In addition, the Fourteenth Amendment analysis articulated in *Swain* conflicts with this Court's more recent decisions under the Fourteenth Amendment. By focusing entirely on proof of systematic discrimination, the Court in *Swain* lost sight of the central meaning of the Equal Protection Clause: that every defendant is *individually* entitled "to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in

---

[2] *continued*
government's evidence is relatively weak and the defendant is black. Based in part upon such empirical evidence, many legal commentators have taken the position that the *Swain* rule affords inadequate protection to individual constitutional rights, and they have therefore advocated adoption of the *Wheeler* rule. The most important of those commentaries are catalogued in Appendix A, *infra*.

the administration of justice." *Alexander v. Louisiana*, 405 U.S. 625, 628-29 (1972), *citing Ex parte Virginia*, 100 U.S. 339 (1880), and *Gibson v. Mississippi*, 162 U.S. 565 (1896). *See also Castaneda v. Partida*, 430 U.S. 482 (1977).

The cross-section of the community principle embodied in the Sixth Amendment was first articulated by this Court as a component of equal protection. In a long line of cases, this Court has relied on the cross-section principle in holding that the deliberate exclusion of black potential jurors because of their race, in whatever stage of jury selection, is a violation of equal protection. In *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880), this Court struck down a state statute which barred blacks from jury service, noting that "prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full . . . protection which others enjoy." Thus, the protection of a black defendant "against race or color prejudice" is an individual constitutional right, which is violated by "compelling [him] to submit to a trial . . . by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects" (100 U.S. at 309). *See also Alexander v. Louisiana*, 405 U.S. 625, 630-32 (1972); *Hernandez v. Texas*, 347 U.S. 475, 478-79 (1954); *Avery v. Georgia*, 345 U.S. 559, 561-62 (1953); *Ballard v. United States*, 329 U.S. 187, 195 (1946); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 221-22 (1946); *Smith v. Texas*, 311 U.S. 128, 130-31 (1940).

More recently, in *Peters v. Kiff*, 407 U.S. 493 (1972), the Court reversed the conviction of a white defendant because blacks had been excluded from jury service. As Justice Marshall explained in a plurality opinion in which he was joined by Justice Douglas and Justice Stewart,

"the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases" (*id.* at 503). Similarly, "[w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable" (*id.*). The exclusion of such a range of human nature and experience "may have unsuspected importance in any case that may be presented" (*id.* at 504). *See also Apodaca v. Oregon*, 406 U.S. 404, 410-11 (1972).

The Court's decision in *Swain* is aberrational insofar as it holds that an equal protection violation may be established in a particular case only through evidence of an historical pattern or practice of discrimination in jury selection. The Court reached this conclusion only after declining to "hold that the striking of Negroes in a particular case is a denial of equal protection of the laws" (380 U.S. at 221). The Court refused to subject a prosecutor's use of peremptory challenges to equal protection scrutiny because the Court believed that doing so "would entail a radical change in the nature and operation of the challenge" (*id.* at 221-22). Because the *Swain* Court felt compelled to preserve the common law peremptory challenge without any alteration, however minor, the Court effectively sacrificed the defendant's individual right to equal protection in the jury selection process, and therefore put in place an unprecedented and unworkable rule of equal protection analysis. Where the protection of individual constitutional rights required accommodation, the Court instead installed the peremptory challenge in a preferred position. For that reason alone, this prong of the *Swain* holding must be overruled.

In the 20 years since *Swain* was decided, experience has demonstrated that its holding is both doctrinally unsound and practically unworkable. *Swain*'s equal protection analysis, which requires proof of an historical pattern of discrimination to establish a violation of equal protection, has been eroded in subsequent decisions of this Court. In *Alexander v. Louisiana*, 405 U.S. 625 (1972), for example, this Court found an equal protection violation in the selection of a particular all-white grand jury, based on: (1) statistical evidence that the percentage of blacks eligible to participate in that grand jury decreased in each succeeding phase of the selection process, and (2) evidence that the state listed each potential grand juror's race on his identification form. The Court concluded that the selection of an all-white grand jury, together with the incorporation in the jury selection process of a mechanism susceptible to discriminatory application, sufficed to establish a *prima facie* equal protection violation, which the state had not rebutted (*id.* at 630-32). *See also Whitus v. Georgia*, 385 U.S. 545 (1967); *Jones v. Georgia*, 389 U.S. 24 (1967). Notably, the Court did not consider whether this jury selection practice was part of an historic or long-term pattern or practice of discrimination, nor did the Court consider any long-term effect which any such practice may have had on the representation of blacks on grand juries in Louisiana.

No less than the grand jury selection process challenged in *Alexander*, the prosecutor's use of peremptory challenges provides "an easy opportunity for racial discrimination" (405 U.S. at 630). Where individual rights have been abridged in a particular case, correction of that wrong logically cannot be made to depend upon proof that the state has previously violated the constitutional rights of others. *Cf. Connecticut v. Teal*, 457 U.S. 440, 445 (1982) ("an employer [cannot] discriminate against some employees

on the basis of race or sex merely because he favorably treats other members of the employees' group"). While evidence of an historical pattern or practice of discrimination may provide relevant and useful proof of discrimination in a particular case, the lack of such evidence cannot establish the absence of a constitutional violation in a particular case. Logically, other competent evidence may also be used to prove discrimination. For example, a prosecutor may admit that his purpose was to exclude blacks from the jury. Alternatively, the prosecutor may offer an explanation which cannot withstand the most minimal scrutiny. He may say, for instance, that his decision to exclude all black veniremen was based on their responses to particularly significant questions, while the record reflects that he never bothered to ask those same questions of the white veniremen whom he did not challenge. Such evidence is no less (and probably more) probative of discrimination in a particular case than is evidence derived by inference from a prior pattern or practice.

Swain's stringent limitation on the type of proof acceptable in demonstrating racial discrimination in this context has erected a practically impenetrable barrier to the protection of this important right. Efforts to prove a pattern of discrimination are necessarily limited by the extent to which relevant facts, such as the race of challenged jurors, have been made a part of the record in prior cases. As Justice Marshall has observed, "[i]t is doubtful that many jurisdictions maintain comprehensive records of peremptory challenges, let alone information regarding the race of those individuals challenged." *McCray v. New York*, 461 U.S. 961, 965-66 n.4 (1983) (Marshall, J., dissenting from denial of certiorari). In most cases, therefore, defense counsel will bear the burden of developing a record concerning the prosecutor's use of peremptory

challenges, often at the price of annoying the trial judge, who will be understandably anxious to commence the trial. There may be little incentive for defense counsel to make such a record in an individual case, however, because that record will not assist the defendant on trial, but only some future defendant, to whom defense counsel owes no duty of loyalty. Indeed, given defense counsel's duty to the defendant on trial, it might well be unethical for him to risk incurring the disapproval of the trial judge by persisting in an unwanted attempt to develop the record. Even in those cases in which evidence, albeit often anecdotal, has been presented, courts have almost uniformly rejected challenges brought under *Swain*. *See McCray v. Abrams*, 750 F.2d 1113, 1120 & n.2 (2d Cir. 1984), *petition for cert. filed*, No. 84-1426 (March 4, 1985). In sum, the requirements of proof established by *Swain*, being virtually unattainable in practice, have eviscerated the constitutional right identified in that case.[3]

By turning back blacks at the threshold of the jury box, the state discriminates not only against black defendants, but also against the black veniremen who are inexplicably barred from fully exercising the rights and duties of citizenship. To excuse blacks, one by one, from the venire, until the only remaining faces are white, with no obvious explanation but for the color of their faces, not only dis-

---

[3] As a practical matter, proof of a constitutional violation has been foreclosed by the Court's holding that only proof of an historical practice of similar violations can suffice to overcome the presumption that a prosecutor has used his peremptory challenges for a proper purpose. *See Commonwealth v. Martin*, 461 Pa. 289, 299, 336 A.2d 290, 295 (1975) (Nix, J., dissenting) ("Is justice to sit supinely by and be flaunted in case after case before a remedy is available? Is justice only obtainable after repeated injustices are demonstrated? Is there any justification within the traditions of the Anglo-Saxon legal philosophy that permits the use of a presumption to hide the existence of an obvious fact?").

credits the judicial process, but puts "a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880). The imposition of that badge of slavery, within the four walls of a court of law, cannot be tolerated in a society which stands upon the principle that justice may not be rationed according to wealth, race, color or creed.

II.

STATE AND FEDERAL COURTS HAVE DEVELOPED A WORKABLE ALTERNATIVE TO *SWAIN* WHICH PROTECTS THE CONSTITUTIONAL RIGHTS OF CRIMINAL DEFENDANTS AND PRESERVES THE DISCRETION OF PROSECUTORS IN EXERCISING PEREMPTORY CHALLENGES.

In *Swain*, the Court sought to preserve "the peremptory system and the function it serves in a pluralistic society in connection with the institution of the jury trial" (380 U.S. at 222). Recognizing that racial discrimination in jury selection violates individual constitutional rights, the Court in *Swain* nonetheless declined to require any inquiry into the prosecutor's reasons for exercising his peremptory challenges because the Court feared that such a rule would emasculate the peremptory challenge. As a result, the *Swain* Court adopted an equal protection analysis which has proven ineffective and unworkable as well as doctrinally unsound.

Recognizing both the failure of the *Swain* rule and the need for an alternative that would protect both the constitutional rights of individual defendants and the continued efficacy of the peremptory challenge, several state and federal courts have reexamined *Swain* in light of

more recent Sixth Amendment and equal protection cases. In a series of decisions, these courts have adopted a rule which allows the ordinary exercise of peremptory challenges, while also preserving the right of a criminal defendant to challenge the prosecutor's discriminatory use of peremptory challenges in an individual case. The rule articulated by those courts is essential to the protection of individual constitutional rights, does no damage to the use of peremptory challenges, and warrants adoption by this Court.

A. State and Federal Courts Have Developed A Rule Which More Effectively Balances The Competing Concerns Identified In *Swain*.

The appellate courts of five states and two federal circuits have rejected *Swain*, in favor of an alternative rule which protects the right of a criminal defendant to a representative jury, while leaving virtually untouched the traditional discretion of peremptory challenges. The California Supreme Court first proposed this alternative rule in *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978), to resolve the tension between these competing values in a manner more exacting than that which this Court embraced in *Swain*. Subsequent application of the *Wheeler* rule has confirmed its effectiveness as a workable rule to protect the competing interests involved.

The *Wheeler* court concluded that the racially biased use of peremptory challenges violated the defendant's state law right to a representative jury. In creating a mechanism to protect that right, the court first adopted the precept in *Swain* that the prosecutor is entitled to the presumption that he has exercised his peremptory challenges on constitutionally permissible grounds. The court then held, however, that if a defendant believes that the state has used its peremptory challenges to strike jurors

because of their group membership, he should interpose an immediate objection. To substantiate that objection, the defendant must then prove a *prima facie* case of discrimination by making a complete record of the proceedings, establishing the exclusion of a cognizable group, and showing from the overall circumstances that there was "a *strong likelihood*" that the stricken veniremen were excluded on the basis of group association rather than personal characteristics (22 Cal. 3d at 280-81, 583 P.2d at 764 (emphasis added)).[4]

Only after the trial court has determined the sufficiency of the defendant's *prima facie* case does the burden shift to the state to show the existence of valid reasons for the exercise of its challenges. Such justification need not rise to the level of an objection for cause, of course, and may be based on the totality of the circumstances rather than single, specific traits. Only if the court finds that the prosecution has failed to satisfy this burden of justification will the court dismiss the jury so selected. In all other cases, the jury will be impaneled and the case tried without delay (22 Cal. 3d at 281-82, 583 P.2d at 765).

The *Wheeler* rule strikes a reasonable balance between the prosecutor's interest in the unbridled use of peremptory challenges and the defendant's constitutional right to a jury selected from a fair cross-section of the community. By requiring the defendant to make both a con-

---

[4] Without exhausting the ways in which such a showing may be made, the *Wheeler* court described types of evidence which may support a showing of the discriminatory use of peremptories. The objecting party may show that all or most of a particular group has been challenged; that the challenged jurors share only their group affiliation, while differing in all other respects; that the party has failed to engage in any voir dire before exercising his challenges; and that the challenged jurors share a group affiliation with the defendant, and differ from the victim (22 Cal. 3d at 280-81, 583 P.2d at 764).

temporaneous objection to the use of peremptory challenges and a showing of a strong likelihood of discrimination, the rule preserves the prosecutor's broad discretion in exercising peremptory challenges in all but the most extraordinary case. Recognizing the effectiveness of the *Wheeler* rule, the courts of Massachusetts, New Mexico, Florida, and New Jersey have recently adopted it. *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979); *State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980); *State v. Neil*, 457 So. 2d 481 (Fla. 1984); *State v. Gilmore*, 199 N.J. Super. 389, 489 A.2d 1175 (Super. Ct. App. Div. 1985).[5] In addition, two federal courts of appeals have also adopted the *Wheeler* rule. The Second Circuit adopted the rule under the Sixth Amendment in *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *petition for cert. filed*, No. 84-1426 (March 4, 1985), while the Fifth Circuit, in *United States v. Leslie*, 759 F.2d 366, *reh'g en banc granted*, 759 F.2d 366 (5th Cir. 1985), recently adopted the rule pursuant to its supervisory power over federal prosecutions.

B. The *Wheeler* Rule Is Necessary To Ensure The Constitutional Exercise of Peremptory Challenges.

The *Wheeler* rule protects the right of an individual defendant to be free from racial discrimination in the selection of a trial jury, while also preserving intact the efficacy of the peremptory challenge. As Justice Marshall

---

[5] The intermediate appellate courts of New York and Illinois also adopted the *Wheeler* rule, but the courts of last resort of those two states subsequently reaffirmed the *Swain* rule, both largely on the basis of *stare decisis*. *People v. Payne*, 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (1982), *rev'd*, 99 Ill. 2d 135, 457 N.E.2d 1202 (1983), *cert. denied*, 105 S. Ct. 447 (1984); *People v. Thompson*, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981), *overruled by People v. McCray*, 57 N.Y.2d 542, 443 N.E.2d 915 (1982), *cert. denied*, 461 U.S. 961 (1983).

has observed, the *Wheeler* procedure "appears to be quite workable." *McCray v. New York*, 461 U.S. 961, 969 (1983) (Marshall, J., dissenting from denial of certiorari). The accuracy of that observation is confirmed by the experience of those states that have adopted the *Wheeler* rule.

In the seven years since the *Wheeler* rule was adopted, the California Supreme Court has been required to decide only one case tried since the decision in *Wheeler*, involving the use of peremptory challenges to exclude qualified citizens from juries because of group bias.[6] In that case, *People v. Hall*, 35 Cal. 3d 161, 168-69, 672 P.2d 854, 858-59 (1983), the California Supreme Court reversed a criminal conviction because the trial judge had held that a prosecutor's use of peremptory challenges could be deemed unconstitutional only in the rare case in which the prosecutor actually admitted that he had practiced discrimination during jury selection. In *Hall*, the California Attorney General criticized the *Wheeler* rule as unworkable and called for its reversal.[7] The California Supreme Court noted, however, that the state's contention was without foundation in empirical evidence, was based on an improper perception of the *Wheeler* rule, and was belied by the dearth of reported cases raising any issue under *Wheeler*

---

[6] In two earlier decisions, the California Supreme Court refused to apply the *Wheeler* rule to juries empaneled before the Supreme Court's decision in that case. *See People v. Mack*, 27 Cal. 3d 145, 611 P.2d 454 (1980); *People v. Allen*, 23 Cal. 3d 286, 590 P.2d 30 (1979). *Accord Reddick v. Commonwealth*, 381 Mass. 398, 409 N.E.2d 764 (1980) (Massachusetts rule applied only prospectively and to cases pending on direct appeal at the time *Soares* was decided).

[7] The California Attorney General claimed that the *Wheeler* rule prohibited the use of peremptories to strike jurors based on "hunches." The California Supreme Court disagreed, observing that a prosecutor may still follow his hunches unless his "hunches" lead only to the exclusion of jurors of a single group affiliation, and even then the prosecution is free to rebut the inference of discrimination (35 Cal. 3d at 169-71, 672 P.2d at 859-60).

in the intervening years (35 Cal. 3d at 169-70, 672 P.2d at 859).

Since its decision in *Hall*, the California Supreme Court has not had occasion to revisit the *Wheeler* question, which indicates that the rule has proved workable in practice. Even more compelling is the fact, as the California Supreme Court noted in *Hall*, that the issue had been raised in only three reported decisions of the California Appellate Court in the five years between the decisions in *Wheeler* and *Hall* (35 Cal. 3d at 170 n.12, 672 P.2d at 859 n.12). The issue has been raised, of course, in several California Appellate Court cases since the California Supreme Court's decision in *Hall*. In all the years since *Wheeler* was decided, however, the California Appellate Court has reversed only one criminal conviction because of a trial court's failure to comply with *Wheeler*. *See People v. Fuller*, 136 Cal. App. 3d 403, 186 Cal. Rptr. 283 (1982).

The experience in Massachusetts has been similar. Although the Supreme Judicial Court and the Massachusetts Appeals Court have both addressed the issue in a number of cases since *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979), only one criminal conviction has ever been reversed because of prosecutorial misuse of peremptory challenges. *See Commonwealth v. Brown*, 11 Mass. App. Ct. 288, 416 N.E.2d 218 (1981).[8]

[8] In one additional case, which had been tried before the Supreme Judicial Court adopted the *Wheeler* rule, the Massachusetts Appeals Court reversed a conviction on this ground, but the Supreme Judicial Court granted further review and reversed that court's decision on the facts of that case. *See Commonwealth v. Gagnon*, 16 Mass. App. Ct. 110, 449 N.E.2d 686 (1983), *rev'd sub nom., Commonwealth v. Bourgeois*, 391 Mass. 869, 465 N.E.2d 1180 (1984).

Since *State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980), the New Mexico courts have revisited the issue only once, in a case in which the Appeals Court found no violation of the New Mexico version of the *Wheeler* rule and affirmed the defendant's conviction. *See State v. Davis*, 99 N.M. 522, 660 P.2d 612 (Ct. App. 1983).

From this experience, one must conclude that the *Wheeler* rule is workable and that it accomplishes its purpose. On the one hand, the prosecutor's discretion in exercising peremptory challenges remains undiminished. On the other hand, the absence of racial discrimination in the trial of cases is assured prior to trial, as it should be, without creating unnecessary issues for resolution on appeal.

The *Wheeler* rule has proved to be workable in practice as a result of its allocation of the burden of proof. Like the *Swain* rule, *Wheeler* presumes that the exercise of peremptory challenges in any particular case is consistent with constitutional requirements. The *Wheeler* rule differs in application from *Swain* only if the defendant satisfies the trial court, based on a timely objection, that the pattern of peremptory challenges creates a *strong likelihood* of discriminatory use. Once the strong likelihood test is satisfied, however, the *Wheeler* rule assures enforcement of constitutional rights for each individual defendant so affected, rather than requiring an accumulation of historical proof of racial discrimination before such enforcement can occur.

As the California Supreme Court found in *People v. Hall*, the *Wheeler* rule has not diminished the currency of the peremptory challenge, which retains a vital role in the California system of criminal justice. While the *Wheeler* rule does require a prosecutor to explain his peremptory challenges when a defendant satisfies the heavy burden of establishing a *prima facie* case, such a

limited incursion into the prosecutor's absolute discretion is necessary to assure protection of individual constitutional rights. Unlike *Swain*, the *Wheeler* rule strikes the proper accommodation between these competing interests.[9]

In analogous areas, this Court has limited the traditionally unfettered discretion of government officials in order to accommodate constitutional rights. For example, this Court has held that non-tenured public employees may not be discharged for constitutionally impermissible reasons, despite the strong tradition of the common law that such employees may be discharged for any reason or no reason at all. *Compare Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 284 (1977), *with Board of Regents v. Roth*, 408 U.S. 564, 578 (1972). Likewise, the broad discretion accorded prosecutors in the initiation and preparation of criminal cases, which this Court recently has described as "particularly ill-suited to judicial review," is nonetheless subject to judicial review if it is " 'deliberately based upon an *unjustifiable standard* such as *race*, religion, or other arbitrary classification.' " *Wayte v. United States*, 105 S. Ct. 1524, 1531 (1985), *quoting Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (emphasis added).

Like the peremptory challenge, the roots of the employment-at-will and prosecutorial discretion doctrines run deep in our legal history. Nonetheless, in order to

[9] Indeed, the *Wheeler* rule, by focusing on the case at bar, rather than on a prior pattern of discrimination, may benefit the prosecutor, who will be afforded an opportunity to explain his use of peremptory challenges. If he gives credible reasons for exercising his peremptory challenges to strike members of a particular racial group, those challenges may still be sustained, even if the state has previously engaged in discrimination. That possibility is foreclosed by *Swain*.

protect the constitutional rights of public employees and criminal defendants, this Court has held that these traditional elements of unreviewable governmental discretion must yield in some small way to accommodate individual constitutional rights. The *Wheeler* rule likewise imposes a reasonable and minimal limitation on the power of prosecutors to use peremptory challenges for racially discriminatory reasons. This Court should adopt the *Wheeler* rule as the least intrusive method for giving effect to the Sixth and Fourteenth Amendment rights which are clearly abridged by the practice of racial discrimination in the use of peremptory challenges.

CONCLUSION

The judgment of the Supreme Court of Kentucky should be reversed and the cause remanded.

Respectfully submitted,

FRED N. FISHMAN
ROBERT H. KAPP
Co-Chairmen
NORMAN REDLICH
Trustee
WILLIAM L. ROBINSON
NORMAN J. CHACHKIN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
Suite 400
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212

BARRY SULLIVAN
Counsel of Record
RICHARD P. STEINKEN
MICHAEL T. BRODY
JENNER & BLOCK
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Attorneys for Amicus Curiae

Dated: June 28, 1985

APPENDIX A

I. Legal Commentary Concerning *Swain* and Alternative Rules

Brown, McGuire & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 New Eng. L. Rev. 192 (1978);

Kuhn, *Jury Discrimination: The Next Phase*, 41 S. Cal. L. Rev. 235 (1968);

Winick, *Prosecutional Peremptory Challenge Practice in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 Mich. L. Rev. 1 (1982);

Comment, *Deterring the Discriminatory Use of Peremptory Challenges*, 21 Am. Crim. L. Rev. 477 (1984);

Note, *Peremptory Challenges*: United States v. Childress: *Discriminatory Use of Peremptory Challenges: The Sixth Amendment as an Alternative Approach*, 17 Creighton L. Rev. 1433 (1983-84);

Note, *Systematic Exclusion of Cognizable Groups by Use of Peremptory Challenges*, 11 Fordham Urb. L. J. 927 (1982-83);

Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 Harv. L. Rev. 1770 (1979);

Comment, *The Sixth Amendment: Limiting The Use of Peremptory Challenges*, 16 J. Mar. L. Rev. 349 (1983);

Note, *Peremptory Challenges in Transition*, 5 Pace L. Rev. 185 (1984);

Comment, Swain v. Alabama: *A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 Va. L. Rev. 1157 (1966);

Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 Yale L. J. 1715 (1977).

II. Sociological Literature Concerning Blacks and the Jury System

H. Kalven & H. Zeisel, *The American Jury* 196-98, 210-13 (1966);

R. Simon, *The Jury and the Defense of Insanity* 111 (1967);

J. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels*, 33-35, 154-60 (1977);

Rhine, *The Jury: A Reflection of the Prejudices of the Community*, in Justice on Trial (D. Douglas & P. Noble eds. 1971);

Adler, *Socioeconomic Factors Influencing Jury Verdicts*, N.Y.U. Rev. L. & Soc. Change 1-10 (1973);

Bell, *Racism in American Courts: Cause for Black Disruption or Despair?* 61 Cal. L. Rev. 165-203 (1973);

Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 Law & Psychology Rev. 103, 107-08 (1979);

Broeder, *The Negro in Court*, 1965 Duke L.J. 19, 22;

Davis & Lyles, *Black Jurors*, 30 Guild Prac. 111 (1973);

Gerard & Terry, *Discrimination Against Negroes in the Administration of Criminal Law in Missouri*, 1970 Wash. St. U.L.Q. 415-37;

Ginger, *What Can Be Done to Minimize Discrimination in Jury Trials?* 20 J. Pub. L. 427, 427-28 (1971);

Gleason & Harris, *Race, Socio Economic Status, and Perceived Similarity as Determinants of Judgments by Simulated Jurors*, 3 Soc. Behav. & Personality 175-80 (1975);

McGlynn, Megas & Benson, *Sex and Race as Factors Affecting the Attribution of Insanity in a Murder Trial*, 93 J. Psychology 93-99 (1976);

Miller & Hewitt, *Conviction of a Defendant as a Function of a Juror-Victim Racial Similarity*, 105 J. Soc. Psychology 156-60 (1978);

Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. Experimental Soc. Psychology 133, 143-44 (1979);

Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 St. Louis U.L.J. 62 (1974).

[redacted]

[redacted]

[redacted]

Question Presented

Whether a prosecutor's use of peremptory challenges to exclude Blacks from jury service because of their race violates the Sixth and Fourteenth Amendments to the Constitution of the United States?

Index

		Page
Interest of the Amici		1
Summary of Argument		5
ARGUMENT		
I.	INTRODUCTION	9
II.	HISTORY OF THE PEREMPTORY CHALLENGE	19
III.	THE EXCLUSION OF BLACKS FROM JURY SERVICE THROUGH THE USE OF PEREMPTORY CHALLENGES VIOLATES THE FOURTEENTH AMENDMENT	24
IV.	THE EXCLUSION OF BLACK JURORS VIOLATES THE RIGHT TO HAVE A JURY REPRESENTATIVE OF THE COMMUNITY	37
V.	EFFECTIVE MINIMALLY INTRUSIVE MEANS EXIST TO REMEDY THE UNCONSTITUTIONAL MISUSE OF PEREMPTORY CHALLENGES	47
Conclusion		60

Table of Authorities

Page

Cases:

Akins v. Texas, 325 U.S. 398 (1945) 15

Alexander v. Louisiana, 405 U.S. 625 (1972) 3, 10, 35, 44

Apodaca v. Oregon, 406 U.S. 404 (1972) 42

Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977) 30, 35

Ballard v. United Stated, 329 U.S. 187 (1946) 38

Ballew v. Georgia, 435 U.S. 223 (1978) 44

Bob Jones University v. United States, __ U.S. __, 76 L.Ed.2d 157 (1983) 12

Broadway v. Culpepper, 439 F.2d 1253 (5th Cir. 1971) 10

Brown v. Allen, 344 U.S. 443 (1953) 38

Carter v. Jury Commission, 396 U.S. 320 (1970) 3, 10

Cassell v. Texas, 339 U.S. 282 (1950) 15

Columbus Bd. of Ed. v. Penick, 443 U.S. 449 (1979) 30

Commonwealth v. Joyce, 18 Mass. App. 417, 467 N.E.2d 214 (Mass. App. Ct. 1984), further appellate review denied, 470 N.E.2d 798 (1984) 55

Commonwealth v. Kelley, 10 Mass. App. 847, 406 N.E.2d 1327 (Mass. App. Ct. 1980) 46

Commonwealth v. Perry, 15 Mass. App. 932, 444 N.E.2d 1298 (Mass. App. Ct. 1983), further appellate review denied, 388 Mass. 1104, 488 N.E.2d 766 (1983) 54

Commonwealth v. Reid, 384 Mass. 247, 424 N.E.2d 495 (Mass. 1981) 55

Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 1 881 (1979) 13, 37, 53, 55, 58

Duncan v. Louisiana, 391 U.S. 145 (1968) 37

Ex parte Virginia, 100 U.S. 339 (1880) 10

Fay v. New York, 332 U.S. 261 (1947) 42

Hill v. Texas, 316 U.S. 400 (1942) 15

Hirabayashi v. United States, 320 U.S. 81 (1943) 26

Hobby v. United States, __ U.S. __, 82 L.Ed.2d 260 (1984) 12

Korematsu v. United States, 323 U.S. 214 (1944) 26

Loving v. Virginia, 388 U.S. 1 (1967) 26

McCray v. Abrams, 750 F.2d 1113 (2nd Cir. 1984), reh. en banc denied , 756 F.2d 177 (1985) 37

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 30, 32

Mitchell v. Johnson, 250 F. Supp. 117 (M.D. Ala. 1966) 3

Palmore v. Sidoti, __ U.S. __, 80 L.Ed.2d 421 (1984) 26

Patton v. Yount, __ U..S. __, 81 L.Ed.2d 847 (1984) 49, 56

People v. Boone, 107 Misc. 2d 301, 433 N.Y.S.2d 955 (Sup. Ct. 1980) 13

People v. Cobb, 97 Ill.2d 465, 455

N.E.2d 31 (1983) 58

People v. Hall, 672 P.2d 854, 859, 197 Cal. Rptr. 71 (1983) 54, 57

People v. Johnson, 22 Cal. 3rd 296, 583 P.2d 774, 148 Cal. Rptr. 914 (1978) 26

People v. Kagan, 420 N.Y.S.2d 987 (N.Y. Sup. Ct. App. Div. 1979) 13

People v. McCray, 57 N.Y.2d 542, 457 N.Y.S.2d 441, 443 N.E.2d 915 (1982) 13

People v. Payne, 106 Ill. App. 3d 1034, 62 Ill. Dec. 744, 436 N.E.2d 1046 (Ill. Ct. App. 1982), rev'd, 9 Ill.2d 135, 457 N.E.2d 1202 (1983) 13, 22

People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (N.Y. Sup. Ct. App. Div. 1981) 13

People v. Walker, 157 Cal. App.3d 1060, 205 Cal. Rptr. 278 (Ct. App. 1984) 54

People v. Wheeler, 22 Cal. 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978) 13, 37, 53, 54, 55, 56, 58

People v. Williams, 628 P.2d 869, 174 Cal. Rptr. 317 (Cal. 1981) (en banc) 59

Peters v. Kiff, 407 U.S. 493 (1972) 45

Rogers v. Lodge, 458 U.S. 613 (1982) 30

Roman v. Abrams, No. 85 Civ. 0763-CLB (S.D.N.Y. May 15, 1985) 57

Rosales-Lopez v. United States, 451 U.S. 182 (1982) 49

Rose v. Mitchell, 443 U.S. 545 (1979) 12, 60

Smith v. Texas, 311 U.S. 128 (1940) 38

State v. Brown, 371 So.2d 751 (La. 1979) 14, 28

State v. Crespin, 94 N.M.2d 486, 612 P.2d 716 (1980) 13, 37, 53

State v. Gilmore, No. A-870-82 T4 (N.J. Super. Ct. App. Div., March 8, 1985) 53

State v. Neil, 457 So.2d 482 (Fla. 1984) 13, 37, 53

State v. Washington, 375 So.2d 1162 (La. 1979) 15, 25, 28

Strauder v. West Virginia, 100 U.S. 303 (1880) 5, 9, 10

Swain v. Alabama, 380 U.S. 202 (1965) passim

Taylor v. Louisiana, 419 U.S. 522 (1975) 38, 39, 40, 41, 43

Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) 26

Turner v. Fouche, 396 U.S. 346 (1970) 3, 10

United States v. Childress, 715 F.2d 1313 (8th Cir. 1983) 13, 28

United States v. Clark, 737 F.2d 679 (7th Cir. 1984) 13

United States v. Jackson, 696 F.2d 578 (8th Cir. 1982) 14

United States v. Leslie, 759 F.2d 366 (5th Cir. 1985), rehearing en banc granted 31

United States v. McDaniels, 379 F. Supp. 1243 (E.D. La. 1974) 13, 31

United States v. Marchant, 25 U.S. 480 (1827) 23

United States v. Newman, 549 F.2d 240 (2nd Cir. 1977) 13

United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971) 28

United States v. Schackleford, 59 U.S. 588 (1856) 23

United States v. Whitfield, 715 F.2d 145 (4th Cir. 1983) 13

United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983) 30, 34

Virginia v. Rives, 100 U.S. 313 (1880) 10

Wainwright v. Witt, __ U.S. __, 83 L.Ed.2d 841 (1985) 49

Wheathersby v. Morris, 708 F.2d 1493 (9th Cir. 1983) 13

Whitus v. Georgia, 385 U.S. 545 (1967) 36

Williams v. Florida, 399 U.S. 78 (1970) 39

Williams v. Illinois, __ U.S. __, 104 S.Ct. 2634 (1984) 14

Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983) 13

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 26

Statutes:

Act of March 3, 1865, ch. 86, § 2, 13 Stat. 500 23

Colo. Rev. St. §§ 13-71-107, et seq. 41

Federal Jury Selection and Service Act, Pub. L. 90-274, 82 Stat. 53 11, 41

Idaho Code §§ 2-201 et seq. 41

Hawaii Rev. Stat. §§ 612-1 et seq. 41

Indiana Code §§ 33-4-5.5-1 et seq. 41

Maine Rev. St. §§ 1211 et seq. 41

Md. Ann. Code § 8-1-13 41

Minn. Stat. Ann. §§ 593-31 et seq. 41

Miss. Code 1972, §§ 13-5-2 et seq. 41

No. Dakota Code §§ 17-09.1-01 et seq. 41

1 Stat. 119 (1790) 23

The Ordinance of Inquests, 33 Edw. 1. c.2 (1305) 21

28 U.S.C. § 1861 11, 41

Uniform Jury Selection and Service Act 11, 41

Other Authorities:

4 W. Blackstone, Commentaries 21

Brown, McGuire, and Winters, The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse? 14 New Eng. L. Rev. 192 (1978) 16, 20, 22

Comment, A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process, 18 St. Louis L.J. 662 (1974) 14

Comment, Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury, 52 Va. L. Rev. 1157 (1966) 20, 22

Jackson, Mississippi, Clarion Ledger, July 25, 1983 16

New Orleans Times-Picayune, April 7, 1985 16

Sullivan, Deterring the Discriminatory Use of Peremptory Challenges, 21 Am. Crim. L. Rev. 477 (1984) 27, 45

No. 84-6263,

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JAMES KIRKLAND BATSON,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ of Certiorari to the
Supreme Court of Kentucky

BRIEF AMICI CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE AMERICAN JEWISH COMMITTEE, AND THE AMERICAN JEWISH CONGRESS

Interest of the Amici*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit

---

*Letters from the parties consenting to the filing of this Brief have been lodged with the Clerk of the Court.

corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid without cost to Blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. For many years its attorneys have represented parties and have participated as amicus curiae in this Court and in the lower federal courts in cases involving many facets of the law.

The Fund has a long-standing concern with the issue of the exclusion of Blacks from service on juries. Thus, it has

raised jury discrimination claims in appeals from criminal convictions,[1] pioneered in the affirmative use of civil actions to end discriminatory practices,[2] and, indeed, represented the petitioner in Swain v. Alabama, 380 U.S. 202 (1965), the case which first raised the issue of the use of peremptory challenges to exclude Blacks from jury venires.

The American Jewish Committee is a national organization of approximately 50,000 members which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It has always been the conviction of this organization that the security and the constitutional rights of American Jews can

---

[1] E.g., Alexander v. Louisiana, 405 U.S. 625 (1972).

[2] Carter v. Jury Commission, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970); Mitchell v. Johnson, 250 F. Supp. 117 (M.D. Ala. 1966).

best be protected by helping to preserve the security and the constitutional rights of all Americans, irrespective of race, religion, sex or national origin. The American Jewish Committee believes that the exclusion of Blacks from juries through the use of peremptory challenges is a grievous deprivation based on race which violates the Sixth and Fourteenth Amendments to the Constitution.

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of all Americans. Since its creation it has vigorously opposed racial and religious discrimination in all areas of American life, including the administration of justice. The American Jewish

Congress believes that the use of peremptory challenges by prosecutors to exclude persons from juries solely on the basis of their race or religion is in violation of the United States Constitution.

SUMMARY OF ARGUMENT

I.

The misuse of peremptory challenges to exclude Blacks from juries is a pervasive and pernicious practice. Its use has supplemented earlier and more obvious devices for preventing minorities from participating in this most fundamental of democratic institutions. The practice violates both the Sixth and Fourteenth Amendments to the Constitution and must be ended to make the promise of Strauder v. West Virginia at last a reality.

II.

Historically, the prosecution did not have the right to challenge jurors peremptorily. Under the common law, peremptory challenges were given to the defense for the purpose of enforcing the defendant's underlying right to a fair and impartial jury of his peers. The right was extended to the prosecution by statute only in the mid-nineteenth century. Nothing in the history of the exercise of peremptory challenges by the prosecution suggests any reason for permitting them to be exercised in a way that is inconsistent with the Sixth and Fourteenth Amendments.

III.

The intentional exclusion of a black potential juror from actual service on a

jury violates the Fourteenth Amendment's guarantee of equal protection. Swain v. Alabama has been consistently misinterpreted by the lower courts as permitting a successful objection to the racially discriminatory exercise of peremptory challenges in only an unduly limited and virtually unprovable set of circumstances. Trial courts should be no less free to infer intentional discrimination by prosecutors in a variety of factual contexts than they are in a wide range of other cases involving proof of intentional discrimination.

IV.

For a prosecutor to strike black jurors from a venire so as to render it unrepresentative of the community violates the Sixth Amendment. Although there is no

right to a jury that mirrors the community, the Constitution prohibits the use of devices which affirmatively defeat a fair opportunity to be tried by a jury that reflects a fair cross-section of that community.

V.

There are a variety of remedies to correct the unconstitutional use of peremptory challenges. Although any method that is selected must realistically promise effectively to guard against discrimination, the states should be given some leeway to experiment with solutions that are consistent with their particular jury selection procedures.

ARGUMENT

I.

INTRODUCTION

One hundred and five years ago this Court held that "the very fact" that black people were prevented from serving on juries:

> . . . because of their color, though they are citizens and may be in other respects fully qualified, is practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Strauder v. West Virginia, 100 U.S. 303, 308 (1880). More than a century later, the promise of Strauder -- that all discriminatory acts directed towards black

citizens in the administration of justice will be ended -- remains unfulfilled.

Until the 1970's, the primary device for excluding Blacks from jury service was simply to keep them off of the jury rolls. Since Blacks never appeared on venires to begin with, the use of the peremptory challenge to get rid of them was rarely required. When 100 years of decisions of this Court reversing convictions for jury discrimination,[3] injunctions issued by federal district courts,[4] and the reform

---

[3] Strauder v. West Virginia, 100 U.S. 303 (1880); Virginia v. Rives, 100 U.S. 313 (1880); Ex parte Virginia, 100 U.S. 339 (1880); see cases cited in Alexander v. Louisiana, 405 U.S. at 628-29, 632 (1972).

[4] E.g., Carter v. Jury Commission, supra; Turner v. Fouche, supra; Broadway v. Culpepper, 430 F.2d 1253 (5th Cir. 1971).

of federal and state jury selection laws [5] made total exclusion impractical, the use of peremptory challenges to exclude those Blacks who were placed on venires became the method of choice to achieve the same historic goal of preventing Black citizens from participating in the criminal justice system. Although the means used to exclude Blacks has changed, the same pernicious consequence continues: black citizens do not have their rightful voice in an institution that is at the heart of a free and democratic society.

The exclusion of Blacks from juries not only stigmatizes them and deprives them of their right meaningfully to participate in the criminal justice system. It "des roys the appearance of

---

[5] E.g., The Federal Jury Selection and Service Act, 28 U.S.C. §§ 1861 et seq.; Uniform Jury Selection and Service Act, National Conference of Commissioners on Uniform State Laws, 1971.

justice and thereby casts doubt on the integrity of the judicial process . . ., impair[ing] the confidence of the public in the administration of justice." Rose v. Mitchell, 443 U.S. 545, 555-56 (1979); accord Hobby v. United States, ___ U.S. ___, 82 L.Ed.2d 260, 277 (1984) (Stevens, J., dissenting). Nothing could be more destructive to public confidence in the legitimacy of criminal justice than the specter of a prosecutor deliberately manipulating the process to exclude identifiable segments of the community on the basis of race, in contravention of "deeply and widely accepted views of elementary justice . . . ." Bob Jones University v. United States, ___ U.S. ___, 76 L.Ed.2d 157, 174 (1983).

The proliferation of cases raising

the issue of this misuse of peremptory challenges demonstrates that the practice is nationwide, arising in states from California to New York and Massachusetts to Florida.[6] Thus, the Illinois Supreme Court has reviewed "at least 33 cases in which criminal defendants have alleged prosecutorial misuse of peremptory

---

[6] See, e.g., People v. Wheeler, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978); State v. Neil, 457 So.2d 482 (Fla. 1984); People v. Payne, 106 Ill. App. 3d 1034, 62 Ill. Dec. 744, 436 N.E.2d 1046 (Ill. Ct. App. 1982), rev'd, 9 Ill. 2d 135, 457 N.E.2d 1202 (1983); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 1 881 (1979); State v. Crespin, 94 N.M. 2d 486, 612 P.2d 716 (1980); People v. Kagan, 420 N.Y.S.2d 987 (N.Y. Sup. Ct. App. Div. 1979); People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (N.Y. Sup. Ct. App. Div. 1981); People v. Boone, 107 Misc. 2d 301, 433 N.Y.S.2d 955 (Sup. Ct. 1980); People v. McCray, 57 N.Y.2d 542, 457 N.Y.S.2d 441, 443 N.E.2d 915 (1982); United States v. Newman, 549 F.2d 240 (2nd Cir. 1977); United States v. McDaniels, 379 F. Supp. 1243 (E.D. La. 1974); United States v. Childress, 715 F.2d 1313 (8th Cir. 1983); United States v. Whitfield, 715 F.2d 145 (4th Cir. 1983); United States v. Clark, 737 F.2d 679 (7th Cir. 1984); Wheatherby v. Morris, 708 F.2d 1493 (9th Cir. 1983); Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983).

challenges to exclude Negro jurors."[7] The Eighth Circuit has noted "the frequency with which we have been called upon to examine the prosecutor's practices in this regard in the Western District of Missouri." United States v. Jackson,[8] 696 F.2d 578, 592 (8th Cir. 1982). And the Louisiana Supreme Court reviewed 9 cases in 7 years from the same parish, 5 of which involved the same prosecutor. State v. Brown, 371 So.2d 751 (La. 1979).

In addition to the many reported decisions, our experience and that of our cooperating attorneys has convinced us that the practice is common and flagrant.

---

[7] See Williams v. Illinois, 104 S. Ct. 2364, 2365 (1984) (denial of cert.) (Marshall, J., dissenting).

[8] See also Comment, A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process, 18 St. Louis L.J. 662, 676-77 (1974), citing to studies finding that local prosecutors struck 83% and 67% of black jurors respectively in one year.

Indeed, prosecutors have publicly admitted that they seek to keep Blacks from sitting on criminal trials as a matter of course because they are afraid that Blacks will be too sympathetic to a defendant. Thus, an instruction book used by the prosecutor's office in Dallas County, Texas, the site of Hill v. Texas,[9] Akins v. Texas,[10] and Cassell v. Texas,[11] advised prosecutors that they did not want a "member of a minority group" on a jury because he will "almost always empathize with the accused."[12] See also, State v.

---

[9] 316 U.S. 400 (1942).

[10] 325 U.S. 398 (1945).

[11] 339 U.S. 282 (1950).

[12] The book states:

"III. What to look for in a juror.

"A. Attitudes

"1. You are not looking for a fair juror, but rather a strong, biased and sometimes hypocritical individual who believes that

Washington, 375 So.2d 1162, 1163 (La. 1979), where the prosecutor testified that he routinely struck Blacks because of his perception that they favored the accused.[13]

---

but rather a strong, biased and sometimes hypocritical individual who believes that Defendants are different from them in kind, rather than degree.

"2. You are not looking for any member of a minority group which may subject him to oppression—they almost always emphathize with the accused.

"3. You are not looking for free-thinkers and flower children."

Brown, McGuire, and Winters, The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse? 14 New Eng. L. Rev. 192, 224 (1978).

[13] See also, New Orleans Times-Picayune, April 7, 1985, p. A-16, and the Jackson, Mississippi, Clarion Ledger, July 15, 1983, p. 1A, quoting an Orleans Parish and a Hinds County prosecutor, respectively, to similar effect.

Our position is simple. The exclusion of a single juror because of his or her race or national origin violates the Fourteenth Amendment's guarantee of equal protection. The issue in Swain, we submit, was not whether the exclusion of a single juror because of race violates the constitution, but rather how one proves the discriminatory motive of such a single exclusion. The lower courts have confused the two issues and have improperly read Swain as limiting the finding of a constitutional violation to those rare circumstances where it can be shown that prosecutors in case after case, over a long period of time, have used peremptory challenges to exclude Blacks. The continued misinterpretation of Swain that allows the decision to be used as a cover

for a discriminatory practice should be repudiated.

We would also urge that the exclusion of Blacks from juries through the use of peremptory challenges violates the right to a jury representative of a fair cross-section of the community, by destroying the opportunity of having a representative jury seated. The lower courts have misconstrued holdings of this Court that there is no requirement that a particular jury mirror the community. These decisions do not hold that nothing can be done to end a practice which affirmatively prevents a representative jury from being seated.

In this brief we will discuss the Fourteenth and Sixth Amendments and will suggest remedies to end the misuse of

peremptory challenges that will not interfere with their proper use. First, however, we will briefly discuss the history of the peremptory challenge, and particularly its use by the prosecution. In this way the interest involved in the prosecutor's right to peremptorily challenge jurors, on the one hand, and the interest in ensuring that the criminal justice system is free from any taint of racial discrimination, on the other, will be put into proper perspective.

II.

THE HISTORY OF THE PEREMPTORY CHALLENGE

At common law, the prosecutor did not have the right to excuse peremptorily

potential jurors. Rather, that right derives solely from statute, and gained wide acceptance only in the last one hundred years -- around the time that the post-Civil War constitutional amendments were ratified and this Court began to apply the Fourteenth Amendment's guarantee of equal protection to the wholesale exclusion of blacks from the jury and grand jury systems.[14]

In early English law, jurors functioned essentially as witnesses -- as fact-givers rather than fact-finders. The Crown therefore initially exercised complete control over their selection; any unacceptable juror could be removed by the prosecution.[15] Parliament enacted the

---

[14] See, op. cite supra n. 12, at 195.

[15] Op. cite supra, n. 12, at 194; Comment, Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of The All-White Jury, 52 Va. L. Rev. 1157, 1170-71 (1966)

Ordinance of Inquests in 1305,[16] which limited the Crown to challenging jurors for "cause certain." On the other hand, by the time of the American Revolution, the peremptory challenge was firmly rooted in the common law as one of a defendant's greatest protections -- in the words of Blackstone, "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous."[17]

[16] 33 Edw. 1. c.2 (1305).

[17] 4 W. Blackstone, Commentaries 353.

In reaction to the Ordinance of Inquests the English courts did fashion the practice of "standing aside" jurors. The prosecution can require a juror to whom it objects to "stand aside" until all other potential jurors have been called; after the defendant has exercised all his challenges, if there are too few veniremen remaining to compose a jury, only then is the juror "stood aside" allowed to sit, unless the Crown can show cause why he should not be. As one court has noted, however,

> The procedure of having a juror stand aside is not a peremptory challenge because, even when the procedure is employed by the Crown, which is seldom, the

The peremptory challenge for the defendant was thus a part of the common law received by the American states, while the grant of a similar privilege to the prosecution was not.[18] Extension of that privilege to the prosecution was strongly resisted in early state histories, and was slow in gaining legislative acceptance.[19] Thus, while one early decision of this Court asserted that the English practice of standing jurors aside was part of this

---

juror who has been stood aside may be actually seated as a juror after the defendant has exercised his challenges. Specifically, 26 Halsbury's Laws of England, par. 624 (4th ed. 1579) states: "The Crown has no right to make peremptory challenges."

People v. Payne, 105 Ill. App. 3d 1034, 1039 n. 4 (Ill. Ct. App. 1982).

[18] See op. cit. supra note 12, at 194.

[19] For a review of this history, see op. cit. supra note 15, at 1170-73.

country's common law heritage,[20] the Court correctly held in 1856 that the prosecutor's right to stand jurors aside was not part of American common law, and therefore only applied in federal court if the state in which the federal court was sitting extended that right to prosecutors.[21] Although defendants in federal prosecutions were guaranteed the peremptory challenge by statute in 1790,[22] it was not extended to all federal prosecutors until 1865.[23]

In short, the peremptory challenge was not recognized in the Colonies and new States as a right of the prosecution.

---

[20] United States v. Marchant, 25 U.S. 480, 483 (1827).

[21] United States v. Shackleford, 59 U.S. 588, 590 (1856).

[22] 1 Stat. 119 (1790).

[23] Act of March 3, 1865, ch. 86, § 2, 13 Stat. 500.

Rather, it was given to the defense as a means of assuring the underlying right to a fair and impartial jury guaranteed by the Bill of Rights. It was a protection of the people against governmental overreaching. The use of peremptory challenges by the prosecution to undermine the right to a jury representative of the community stands history on its head. As we show below, it is at odds with the Constitution.

III.

THE EXCLUSION OF BLACKS FROM JURY SERVICE THROUGH THE USE OF PEREMPTORY CHALLENGES VIOLATES THE FOURTEENTH AMENDMENT.

In order to illustrate our argument that the use of the peremptory challenge to exclude Blacks is a denial of equal protection, we will use the following

hypothetical. By random selection from a truly representative jury wheel, a single Black is selected for the venire. The prosecutor uses a peremptory challenge to strike the sole Black juror, and announces that he has done so for the specific purpose of excluding any Blacks from sitting on the jury.[24] Finally, the prosecutor confesses that it is his experience that black jurors tend to favor defendants, and therefore he believes it is to his advantage not to have them sit on the jury.

We submit that this hypothetical set of facts would establish a clear violation of the Equal Protection Clause of the Fourteenth Amendment. Indeed, the hypothetical prosecutor's action is of the type most clearly contemplated to be in

[24] See State v. Washington, 375 So.2d 1162 (La. 1979).

violation of the Equal Protection Clause whose "central purpose . . . is th prevention of official conduct discrimi natory on the basis of race." Washingto v. Davis, 426 U.S. 229, 239 (1976). No only is it an adverse action deliberatel taken on the basis of race, and therefo presumptively illegal under many decisio of this Court,[25] but it is based o notions of racial characteristics whi are anathema to the most fundament principles that the equal protecti clause seeks to protect.[26]

---

[25] Palmore v. Sidoti, ___ U. S. ___, 80 L.Ed.2d 421, 42 (1984); Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. United States, 323 U.S. 214, 216 (19

[26] Yick Wo v. Hopkins, 118 U.S. 356 (1886); Hirabayashi v. United States, 320 U.S. 81, 100 (1943); Thiel v Southern Pacific Co., 328 U.S. 217, 220 (1946) (1943); People v. Johnson, 22 Cal. 3d 296, 299, 58 P.2d 774, 775, 148 Cal. Rptr. 914, 916 (1978).

The problem presented by the misuse of peremptory challenges arises only because it will be the rare case in which a prosecutor admits that the reason for his action was race. In Swain, this Court hypothesized another set of facts in which a violation could be proven by a statistical showing that over a long period of time, in case after case, the prosecutor consistently struck Blacks from juries.[27] However, the hypothetical facts set out in Swain were taken by lower courts to be the only circumstances in which a constitutional violation could be found,[28] and the difficulty of assembling such a showing

---

[27] 380 U.S. at 223.

[28] Sullivan, Deterring the Discriminatory Use of Peremptory Challenges, 21 Am. Crim. L. Rev. 477, 485 (1984), and cases there cited.

made it virtually impossible to prevail regardless of the actual discriminatory practice.[29]

There are a number of reasons why, in the twenty years since Swain, there have been virtually no cases in which a defendant has been able to demonstrate that prosecutors have stricken Blacks in case after case over a long period of time. First, courts do not routinely record voir dires, the race of jurors that are excused, or the grounds of excusal. Second, even where there are any records, such as transcripts of voir dires, there is no ready means to determine in which

---

[29] See, e.g., United States v. Pearson, 448 F.2d 1207, 1217 (5th Cir. 1971); United States v. Childress, 715 F.2d 1313, 1317 (8th Cir. 1983), en banc. Of all the cases cited in the Appendix, in only two, have defendants been able to meet the Swain burden of proof, and both involved the same prosecutor, who had admitted under oath that he customarily struck all black jurors. State v. Brown, 371 So.2d 751 (La. 1979); State v. Washington, 375 So.2d 1162, 1163-64 (La. 1979).

cases they have been made or kept. Third, most criminal defendants lack the resources to conduct an investigation adequate to assemble the necessary data. Fourth, the issue will usually arise in the middle of voir dire when Blacks are struck; there will simply not be enough time to conduct an inquiry unless a lengthy continuance of the trial is granted, with the accompanying disruption of the orderly course of justice. Fifth, for all of the above reasons, the only evidence available as a practical matter will be the testimony of presiding judges, court clerks, and members of the bar as to their recollection of events that occurred in years past. Finally, unlike an ordinary challenge to the make-up of the jury rolls, it is also totally impractical to raise the peremptory challenge issue in an affirmative injunctive action. In

addition to the impossibility of assembling the proof, an order prohibiting the prosecutor from striking Blacks because of their race would be unenforcible without proof that that was his intent in a specific case.

The restrictive reading of Swain by lower courts is inconsistent with other decisions of this Court. In every other context, the Court has recognized the ability of a trial judge to infer discrimination from a wide variety of circumstances.[30] Thus, the misinterpretation of Swain has resulted in anomalous results in comparison to every other area of discrimination. In one federal case,

---

[30] E.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (employment); United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983) (employment); Rogers v. Lodge, 458 U.S. 613 (1982) (voting); Columbus Bd. of Ed. v. Penick, 443 U.S. 449 (1979) (school desegregation); Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977) (governmental action).

for example, the defendants challenged the make-up of the jury rolls as unlawfully excluding Blacks. The district court rejected the claim, holding that, although it was a close question, the under-representation of Blacks was not enough to establish a violation. The prosecutor then proceeded to strike all the Blacks from the venire when the actual jury was assembled. Despite the mutually confirming discriminatory practices, the district court held that because of the absence of a Swain showing of a long history of striking Blacks, there was not a constitutional violation under Swain.[31]

[31] United States v. McDaniels, 379 F. Supp. 1243 (D. La. 1974). The court did order a new trial, however, "in the interests of justice" pursuant to Fed. R. Crim. P. 33. See also United States v. Leslie, 759 F.2d 366 (5th Cir. 1985), rehearing en banc granted, May 14, 1985.

Under ordinary rules for adjudication of a claim of intentional discrimination, however, these circumstances would have allowed the court to draw the inference that the prosecutor had a discriminatory motive. Similarly, when a prosecutor with a limited number of peremptories uses all of them to exclude the few Blacks on the panel, as occurred in petitioner Batson's case, a court should be permitted to infer a discriminatory motive sufficient to cast upon the prosecutor the burden of coming forward with a "legitimate, non-discriminatory reason"[32] for his action.[33]

---

[32] McDonnell Douglas v. Green, 411 U.S. 792, 803 (1974).

[33] In the present case the trial court did not make such a judgment because he specifically declined to make any factual inquiry on an erroneous legal theory. The court took the view that, as a matter of law, the constitutional cross-section requirement was limited to "the whole, entire panel and the selection process," and that "[a]ny body can strike anybody they want to" without constitutional restraint. (Appendix to Petition for Certiorari, at p. 16.) This

Other inquiries would permit a judge to infer discrimination. Did the prosecutor strike all the Blacks called to the jury box, or only some of them? How many Blacks, absolutely or in comparison to whites, were struck? What proportion of peremptories were use to strike Blacks? Were Blacks questioned on voir dire, and, if so, in the same way or as extensively as the whites whom the prosecution struck? What was the demeanor of the prosecutor and the black potential jurors during their exchanges? Did they appear to be fair and impartial jurors? Did the white jurors who were struck have common attributes, visibly adverse reactions to

---

rule of law was expressly endorsed by the Kentucky Supreme Court as the basis for affirming Batson's conviction on appeal: "an allegation of the lack of a fair cross section which does not concern a systematic exclusion from the jury drum does not rise to constitutional proportions." (Id., at p. 5)]

the prosecutor, or obvious drawbacks from a prosecutorial perspective? Did the Blacks? Conversely, did the prosecutor retain whites who had the same attributes as the Blacks that were struck? Did the prosecutor attempt to purge the jury of Blacks by other means, e.g., did he challenge Blacks for cause while passing up equally available for-cause challenges to whites? Did the prosecutor use his last peremptory challenge to get rid of a Black, in contravention of the well-recognized tactic of trial lawyers not to run the risk of getting a worse replacement?

In short, trial court judges should be given the freedom to infer intentional discrimination from the totality of the circumstances in the particular case before them[34] in the same way they may

[34] United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983).

infer such discrimination in a variety of other types of cases decided since Swain. Thus, as this Court noted in Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 n. 14 (1977),

> . . . [A] consistent pattern of official racial discrimination is [not] a necessary predicate to a violation of the Equal Protection Clause. A single invidious discriminatory governmental act would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions.

In jury discrimination cases this Court has also found a violation of the Fourteenth Amendment by a showing that eligible Blacks had been eliminated "at each stage of the selection process until ultimately an all-white grand jury was selected to indict him" in the particular case of the defendant. Alexander v.

Louisiana, 405 U.S. 625, 629 (1972).[35]

In sum, the Fourteenth Amendment is violated whenever the State denies equal protection of the laws, even in a single instance. Repeated denials of equal protection need not be shown in order to trigger the Amendment's protection in an individual case.

---

[35] The Court noted that Alexander was not a case where the systematic exclusion of Blacks over a period of years had been shown. Rather, the proof went only to the selection process for the particular venire and jury. Id. See also Whitus v. Georgia, 385 U.S. 545, 549-50 (1967): it is "the law of this Court as applied to the States through the Equal Protection Clause of the Fourteenth Amendment, that a conviction cannot stand if it is based on an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason of their race." (Emphasis added.)

IV.

THE EXCLUSION OF BLACK JURORS VIOLATES THE RIGHT TO HAVE A JURY REPRESENTATIVE OF THE COMMUNITY.

A number of lower courts have held that Swain should be reexamined in light of subsequent decisions[36] that have held the Sixth Amendment guaranty of a representative jury applicable to the states.[37] The question is: since the use of peremptory challenges to exclude Blacks results in unrepresentative juries, is the practice unconstitutional?

---

[36] Duncan v. Louisiana, 391 U.S. 145 (1968); Taylor v. Louisiana, 419 U.S. 522 (1975).

[37] McCray v. Abrams, 750 F.2d 1113 (2nd Cir. 1984), reh. en banc denied, 756 F.2d 177 (1985). People v. Wheeler, 22 Cal.3d 258, 148 Cal. Rptr. 890, 593 P.2d 748 (1978); State v. Neil, 457 So.2d 482 (Fla. 1948); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979); State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980).

Taylor v. Louisiana, 419 U.S. 522 (1975), held that "[t]he unmistakable import of this Court's opinions, at least since 1940 . . . is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." 419 U.S. at 528. In Smith v. Texas, 311 U.S. 128, 130 (1940), the Court declared that exclusion of racial groups from jury service was "at war with our basic concepts of a democratic society and a representative government." Ballard v. United States, 329 U.S. 187 (1946), reversed a conviction by a jury from which women had been excluded, relying on a federal statutory "design to make the jury a 'cross-section of the community.'" In Brown v. Allen, 344 U.S. 443, 474 (1953),

the Court asserted that the source of jury lists must "reasonably reflect . . . a cross-section of the population suitable in character and intelligence for that civic duty."

In Taylor the Court also relied on its decision in the six-person jury case, which had stated that a jury should "be large enough to promote group deliberation . . . and to provide a fair possibility for obtaining a representative cross-section of the community." Williams v. Florida, 399 U.S. 78, 100 (1970). On the basis of this precedent, the Court declared:

> We accept the fair-cross-section as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the

> exercise of arbitrary power -- to make available the common sense judgment of the community as a hedge against the over-zealous or mistaken prosecutor . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system . . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.' Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting).

Taylor v. Louisiana, 419 U.S. at 530-31.

The requirement of a fair cross-section theory in jury selection has also been adopted by statute as "the policy of the United States."[38] Taylor quoted approvingly from the House Report on the Federal Jury Selection and Service Act:

> It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross

---

[38] Federal Jury Selection and Service Act of 1968, Pub. L. 90-274, 82 Stat. 53, 28 U.S.C. §§ 1861 et seq. Section 1862 provides that:

> No citizen shall be excluded from service as a grand or petit juror . . . on account of race, color, religion, sex, national origin, or economic status.

See also, Section 2 of the Uniform Jury Selection and Service Act (National Conference of Commissioners on Uniform State laws, 1970), and Md. Ann. Code § 8-1-13. The Uniform Act has been substantially adopted by eight states. Colo. Rev. St. §§ 13-71-107 to 13-71-121 (1971); Idaho Code §§ 2-201 to 2-221 (1971); Hawaii Rev. Stat. §§ 612-1 to 612-26 (1973); Indiana Code §§ 33-4-5.5-1 to 33-4-5.5-22 (1973); 14 Maine Rev. St. §§ 1211 et seq. (1971); Minn. Stat. Ann. §§ 593-31 to 593-50 (1977); Miss. Code 1972, §§ 13-5-2 et seq. (1974); No. Dakota Code §§ 17-09.1-01 to 27-09.1-22 (1971).

> sectional goal, biased juries are the result -- biased in the sense that they reflect a slanted view of the community they are supposed to represent.

419 U.S. at 26 n. 37.

The argument based on the Sixth Amendment is not inconsistent with decisions of this Court which hold that the defendant has no right to have his particular jury represent the community with precision.[39] Thus, for example, in a community in which one third of the persons eligible for jury service are Black there is no right to have a jury with four Blacks out of the 12 jurors.

Although this proposition is correct, it does not negate the conclusion that the

---

[39] Apodaca v. Oregon, 406 U.S. 404, 413 (1972) (plurality opinion); Fay v. New York, 332 U.S. 261, 284 (1947).

affirmative use of peremptory challenges to produce an unrepresentative jury violates the Sixth Amendment. What the Court has held is that, assuming a system of jury selection which results in jury lists that are representative of the community, the use of a neutral device to select particular juries does not violate the Fourteenth Amendment just because in a particular case the jury may not precisely mirror that community.[40] Put another way, although there is an affirmative obligation to have a process by which a representative jury can be chosen, there is not an affirmative obligation to achieve the result of juries that are precisely representative.

[40] See, e.g., Taylor v. Louisiana, 419 U.S. at 538.

But the converse must also be true: there is a right not to have selection methods that result in unrepresentative juries. The protections of the Sixth and Fourteenth Amendments cannot stop with the composition of the jury roll (or "drum" in this case), but extend to the selection of the specific jury itself. See Ballew v. Georgia, 435 U.S. 223 (1978); Alexander v. Louisiana, 405 U.S. 625 (1972). Thus, a defendant has the right to a fair opportunity for a jury on which are represented the various groups that make up the community in which he is tried. To allow the unscrutinized use of peremptory challenges on the basis of race biases the process as surely as the exclusion of Blacks from the jury lists or drum.

The right to a fair cross-section is

not based on the notion that individuals vote to convict or acquit because of the racial group to which they belong; rather, it derives from the principle that juries should contain representatives of the various groups in the community so that their opinions, voices, points of view, and perceptions come to bear on the deliberative process. When a prosecutor removes Blacks from the jury the result is a jury which is insulated from one of those viewpoints and voices.[41]

The question of whether the use of peremptory challenges has violated the cross-section requirement will, after all, only arise in a particular case when a fair system has produced a panel of potential jurors that includes Blacks.

---

[41] Peters v. Kiff, 407 U.S. 493, 503-04 (1972); see op. cit. supra n. 28, for an example of the impact on a jury's deliberations of the experiences of a black juror.

Unless the prosecutor strikes them, a representative jury will sit. If then the prosecutor makes the jury unrepresentative by striking some or all of the Blacks, his abuse of the peremptory challenge violates the Sixth Amendment.[42]

---

[42] To illustrate, one may assume a county that is 20% black and that has a jury roll that is also 20% black. In trial #1, 20 potential jurors are randomly selected, one of whom is black, a result well within the range of probability. That single Black is excused for a valid, racially-neutral reason, and an all-white jury sits. That result does not violate the Sixth Amendment.

In trial #2, twenty potential jurors are randomly selected, 4 of whom, or 20%, are black. Through neutral selection criteria 2 of the 12 jurors to sit will be black, or almost 20%. The prosecutor then affirmatively creates a non-representative jury by striking the two Blacks. That result does violate the Sixth Amendment.

V.

EFFECTIVE, MINIMALLY INTRUSIVE MEANS EXIST TO REMEDY THE UNCONSTITUTIONAL MISUSE OF PEREMPTORY CHALLENGES

Amici believe that it is clear that the exclusion of Blacks from juries through the use of peremptory challenges violates both the Sixth and Fourteenth Amendments to the Constitution. There are numerous ways in which these violations can be remedied. They will of necessity vary from locality to locality depending on the particular jury selection practices in use. The appropriate remedy may also vary with the nature of the constitutional violation, depending on the amendments invoked. Amici therefore suggest that the lower state and federal courts be given

leeway to develop appropriate remedies in light of local practices and conditions.

In the first analysis, however, the prophylactice effect of a pronouncement by this Court that the misuse of peremptory challenges violates both the Sixth and Fourteenth Amendments cannot be over-estimated. At present, prosecutors can and do indulge the same misinterpretation of Swain that prevails in the lower courts. They think that the "case after case" language in the Swain opinion defines a substantive principle of constitutional law rather than a principle relating to the sufficiency of factual proof based on statistics (see page 27, supra). Thus, the prosecutor who is conscientious in his desire to obey the Constitution never-

theless sees nothing unconstitutional about peremptorily challenging blacks qua blacks in particular cases, so long as he does not do it in all cases. Told that this is indeed unconstitutional, the conscientious prosecutor will stop doing it.

To the extent that prosecutors do not stop misusing peremptory challenges, the primary agency for enforcing the Constitution will be the trial judge, in proceedings prior to the attachment of jeopardy. As this Court has recognized in other contexts,[43] trial judges are experienced and discerning in the interpretation and understanding of what is being conveyed by the demeanor and interaction of the participants during the

[43] See, Rosales-Lopez v. United States, 451 U.S. 182 (1982); Patton v. Yount, ___ U.S. ___, 81 L.Ed.2d 847 (1984); Wainwright v. Witt, ___ U.S. ___, 83 L.Ed.2d 841 (1985).

process of jury selection. They are fully capable both of recognizing a prima facie case of racially discriminatory peremptory challenges by the totality of the circumstances of the case before them, and of taking effective action to remedy the abuse.

The first thing that a trial judge faced with an apparent prosecutorial misuse of peremptories may do is to ask the prosecutor for an explanation. This alone will often suffice to warn the prosecutor that his behavior is under scrutiny, and make him change his ways. If his explanation for his past behavior is unsatisfactory, or if his behavior persists under circumstances that render the explanation hollow, the trial judge then has numerous options to correct the

problem. He can disallow a peremptory, dismiss the partially-selected jury and bring in a new panel, or take other pretrial corrective action.

For example, there exists a simple, direct, and highly effective way both to correct the exclusion of Blacks and to leave undisturbed the proper use of peremptory challenges. A state need only adopt a practice that would permit defense counsel to object upon the exclusion of a member of a racial or national origin minority group member. From that point on, if a black, Hispanic, etc., juror were excluded by use of a peremptory challenge, he or she would be replaced by a member of the same group. This would be directly responsive to the nature of the violation, insuring a representative cross-section of

the community on the jury. At the same time, it allows the prosecution to strike a juror for any reason other than race.

Such a rule would also have the great advantage of not requiring the prosecutor to explain the reasons for any challenge. Moreover, the mere existence of the rule would do much to end any discriminatory practice since prosecutors would know ahead of time that they would be unable, as a practical matter, to use challenges to exclude all Blacks from juries.[44]

Another possibility is the highly successful remedy that has been working for more than six years in California and

---

[44] Although this particular rule would be a race-conscious remedy, it would not adversely affect the rights of a person who was not a member of the minority group, since that person would simply be selected later and would not lose his or her right to jury service.

Massachusetts[45] without impeding the efficient administration of justice, or infringing significantly upon the wide discretion that has been traditionally accorded to prosecutors in the exercise of their peremptory challenges.

Briefly stated, the system developed by California and Massachusetts requires that the defendant demonstrate a prima facie case of discriminatory intent before the trial judge will look beyond tne traditional presumption that the prosecutor is using his peremptory challenges in a permissible manner. If the judge finds that a prima facie case has been made, the prosecutor is given the opportunity to

---

[45] See People v. Wheeler, 583 P.2d 748, 148 Cal. Rptr. 890 (1978) (Mosk, J.); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979). This model has been adopted elsewhere. See State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980); State v. Neil, 457 So.2d 481 (Fla. 1984), and State v. Gilmore, No. A-870-82 T4 (N.J. Super. Ct. App. Div., March 8, 1985).

show that his challenges are not predicated on group bias. The reasons for the challenges do not have to be sufficient to sustain a challenge for cause, but could relate to any of the many legitimate reasons for peremptory challenges.[46] The judge will examine the prosecutor's reasons and will dismiss the venire or panel[47] or disallow the particular challenge[48] only if the prosecutor fails

---

[46] See People v. Hall, 672 P.2d 854, 859, 197 Cal. Rptr. 71 (1983); People v. Wheeler, 583 P.2d at 760, 148 Cal. Rptr. 890. See, e.g., Commonwealth v. Kelly, 10 Mass. App. 847, 406 N.E.2d 1327, 1328 (Mass. App. Ct. 1980) (accepting prosecutor's challenge based on the prospective juror's "demeanor, manner and the 'smirk on her face'"); People v. Walker, 157 Cal. App. 3d 1060, 205 Cal. Rptr. 278, 280 (Ct. App. 1984) (trial court accepts prosecutor's explanation that a prospective juror "stood out as 'a comic'").

[47] People v. Wheeler, 583 P.2d at 765. Whether the venire as a whole or only the panel drawn for the particular case would be dismissed, could depend on the procedures used in the jurisdiction and the practicality of assembling a new venire without delay.

[48] Commonwealth v. Perry, 15 Mass. App. 932, 444 N.E.2d 1298, 1300, (Mass. App. Ct. 1983), further appellate review denied, 388 Mass. 1104, 448 N.E.2d 766 (1983);

to persuade the court that the challenges were exercised for nondiscriminatory reasons.

This remedy for the discriminatory use of peremptory challenges leaves the jury selection process unaffected in the vast majority of cases.[49] In order to precipitate such an inquiry, the defendant[50] must demonstrate a "strong likeli-

---

Commonwealth v. Reid, 384 Mass. 247, 424 N.E.2d 495, 500 (Mass. 1981).

[49] Amici have examined all of the reported cases in California and Massachusetts involving claims by criminal defendants of racial discrimination under Wheeler and Soares. There have been a total of 15 such cases in California (an average of barely more than 2 a year.) In Massachusetts, where the Soares case has been in effect for six years, there have been 13 such cases. (In New Mexico, which adopted the Wheeler-Soares approach five years ago, there has been only one reported case involving a claim under the rule.)

[50] In Massachuetts, judges occasionally investigate the discriminatory use of peremptory challenges on their own initiative. See Commonwealth v. Joyce, 18 Mass. App. 417, 467 N.E.2d 214, 218 (Mass. App. Ct.1984), further appellate review denied, 470 N.E.2d 798 (1984).

hood" that Blacks "are being challenged because of their group association rather than because of any specific bias". This showing may be on the basis of evidence such as that suggested at pp. 30-34, supra,[51] the nature of the questioning, the demeanor of the potential jurors or the prosecutor, cf. Patton v. Yount, ___ U.S. ___, 81 L.Ed.2d 847 (1984), or any other of a number of factors that ordinarily permit a trier of fact to infer bias.

---

[51] People v. Wheeler, 583 P.2d at 764. The California court listed some of the factors the defendant might rely upon in demonstrating discriminatory uses of challenges. These were (1) that the prosecutor had struck most or all of the members of the identified group from the venire or (2) that he had used a disproportionate number of his peremptory challenges against members of the group or (3) that the jurors in question have only their group identification in common and that they otherwise are as heterogeneous as the community as a whole. 583 P.2d at 764, 148 Cal. Rptr. 890. Courts will also consider the race of the defendant and the victim and whether the prosecutor's questioning of the excluded jurors was "desultory." Id.

One trial judge, disagreeing with his own Circuit Court of Appeals, has argued that providing a remedy for the misuse of peremptory challenges will necessitate "twelve mini-trials" in every case. See Roman v. Abrams, No. 85 Civ. 0763-CLB, slip. op. at 20 (S.D.N.Y. May 15, 1985). The record in California and Massachusetts, the two states with the longest experience with this remedy, refutes this charge. The California Supreme Court has recently found no empirical evidence to support a claim that this remedy has proved "unworkable" in the trial courts. People v. Hall, 672 P.2d 854, 859, 197 Cal. Rptr. 71 (1983) (en banc).

Even though minimally intrusive, the Wheeler-Soares remedy has been effective in reducing the intentionally discrimi-

natory use of peremptory challenges, as the recent reported decisions in California and Massachusetts attest. None of these cases involves a fact pattern showing as blatant a misuse of peremptory challenges as occurred before Wheeler and Soares were decided.[52] Compare, e.g., People v. Cobb, 97 Ill. 2d 465, 455 N.E.2d 31 (1983). The experience in California and Massachusetts demonstrates that the discriminatory use of peremptory challenges is not only reprehensible but also remediable.[53]

---

[52] In Soares itself, the prosecution used peremptory challenges to eliminate twelve of the thirteen black venirepersons. 387 N.E.2d at 508. In Wheeler, the state excluded all of the blacks in the venire (approximately seven) by using peremptory challenges. 583 P.2d at 752-54.

[53] There are, of course, other possible remedies, including abolishing peremptory challenges or limiting them to the defense as under the common law. A state may want to provide for additional voir dire, so that the prosecutor (and defense counsel) will have a more informed basis for exercising their challenges. Indeed, the California Supreme Court has

None of the potential available remedies impedes the vigorous and effective prosecution of crime; none delays trials more than momentarily or encumbers them significantly. Indeed, administration of the rule would involve less disruption of trials than the "case-after-case" rule currently applied: under the prevailing misinterpretation of Swain jury selection must be suspended pending an evidentiary hearing into the prosecutor's record in past cases.

---

recently expanded the scope of voir dire by holding that counsel may ask questions reasonably designed to assist in the intelligent exercise of peremptory challenges even if such questions may not uncover grounds sufficient to sustain a challenge for cause. People v. Williams, 628 P.2d 869, 174 Cal. Rptr. 317 (Cal. 1981) (en banc). Thus, prosecutors are given an opportunity to uncover evidence of specific bias and to exercise their peremptory challenges in a constitutional manner. Id. at 875.

Conclusion

No one can "deny that, [more than 114 years after the close of the War Between the States and nearly 100 years after Strauder, racial and other forms of discrimination still remain a fact of life. . . ." Rose v. Mitchell, 443 U.S. at 558. The final cutting off of all means to perpetuate the practices first condemned in Strauder is not only overdue, but essential to ensure both the reality and the appearance of justice in our society.

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted

JULIUS LeVONNE CHAMBERS
CHARLES STEPHEN RALSTON *
STEVEN L. WINTER
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street
16th Floor
New York, N.Y. 10013
(212) 219-1900

ANTHONY G. AMSTERDAM
New York University
Law School
40 Washington Square South
New York, N.Y. 10012

SAMUEL RABINOVE
The American Jewish
Committee
165 East 56th Street
New York, N.Y. 10022

LOIS WALDMAN
The American Jewish
Congress
15 East 84th Street
New York, N.Y. 10028

Attorneys for Amici Curiae

* Counsel of Record

No. 84-6263

Office-Supreme Court, U.S.
FILED
JUN 28 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES KIRKLAND BATSON,

Petitioner,

—vs—

COMMONWEALTH OF KENTUCKY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS *AMICUS CURIAE*

PATRICIA UNSINN
Assistant Appellate Defender
Office of the State
Appellate Defender
State of Illinois Center
100 West Randolph Street
Suite 5-500
Chicago, Illinois 60601
(312) 793-5472

National Legal Aid and
Defender Association
1625 K Street N.W.
8th Floor
Washington, D.C. 20006

BEST AVAILABLE COPY

23 pp

TABLE OF CONTENTS

	Page
Table of Authorities.....	ii
Interest of Amicus Curiae.....	1
Summary of Argument.....	3
Argument.....	4
THE SIXTH AND FOURTEENTH AMENDMENTS PROHIBIT THE USE OF THE PEREMPTORY CHALLENGE TO RESTRICT UNREASONABLY THE POSSIBILITY THAT THE PETIT JURY WILL COMPRISE A FAIR CROSS SECTION OF THE COMMUNITY.....	4
A. The Sixth And Fourteenth Amendments Guarantee An Accused The Possibility Of A Petit Jury Representative Of A Cross Section Of The Community..	4
B. No Significant State Interest Justifies A Prosecutor's Racially Discriminatory Use Of The Peremptory Challenge..	10
C. Workable Procedures That Have Been Successfully Implemented Provide An Appropriate Remedy Which Would Result In No Undue Burden On The Trial Or Reviewing Courts.....	15
Conclusion.....	26

TABLE OF AUTHORITIES

	Page
Ballew v. Georgia, 435 U.S. 223 (1978).	5,7,9
Commonwealth v. Benbow, 16 Mass.App. 970, 452 N.E.2d 1164 (1983).....	20
Commonwealth v. DiMatteo, 12 Mass. App. 547, 427 N.E.2d 754 (1981)....	21
Commonwealth v. Gagnon, 16 Mass.App. 110, 449 N.E.2d 686 (1983).....	20
Commonwealth v. Joyce, 18 Mass.App. 417, 467 N.E.2d 214 (1984).....	22
Commonwealth v. Kelly, 10 Mass.App. 847, 406 N.E.2d 1327 (1980).....	22
Commonwealth v. Robinson, 382 Mass. 189, 415 N.E.2d 805 (1981).....	19
Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979).....	16,17, 19,21
Commonwealth v. Thomas, 19 Mass.App. 1, 471 N.E.2d 376 (1984).....	21
Commonwealth v. Walker, 379 Mass. 297, 397 N.E.2d 1105 (1979).....	23
Duren v. Missouri, 439 U.S. 357 (1979).....	12
Marbury v. Madison, 1 Cranch 137 (1803).....	13
Oregon v. Kennedy, 456 U.S. 667 (1982).....	23
People v. Allen, 23 Cal.3d 286, 152 Cal.Rptr. 454, 590 P.2d 30 (1979)..	26

	Page
People v. Hall, 35 Cal.3d 161, 197 Cal.Rptr. 71, 672 P.2d 854 (1983)..	23,24, 26
People v. Harvey, ___Cal.App.3d___, 208 Cal.Rptr. 910 (1984).....	22
People v. Randle, 130 Cal.App.3d 286, 181 Cal.Rptr. 745 (1982).....	22
People v. Rousseau, 129 Cal.App.3d 526, 179 Cal.Rptr. 892 (1982).....	20
People v. Walker, 157 Cal.App.3d 1060, 205 Cal.Rptr. 278 (1984).....	22
People v. Wheeler, 22 Cal.3d 253, 148 Cal.Rptr. 890, 583 P.2d 748 (1978).	17,19, 21,22
Peters v. Kiff, 407 U.S. 493 (1972).	5,11
Ristaino v. Ross, 424 U.S. 589 (1976).....	15
Swain v. Alabama, 380 U.S. 202 (1965).....	12
Taylor v. Louisiana, 419 U.S. 522 (1975).....	6,7,9, 10,12
Thiel v. Southern Pacific Co., 328 U.S. 218 (1945).....	5,14
United States v. Clark, 737 F.2d 679 (7th Cir. 1984).....	16
United States v. Leslie, ___F.2d___ (No. 83-3719, 5th Cir., April 10, 1985).....	10
Williams v. Florida, 399 U.S. 78 (1970).....	6

No. 84-6263

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JAMES BATSON,
Petitioner,

-vs-

COMMONWEALTH OF KENTUCKY,
Respondent.

On Petition For Writ Of Certiorari

To The Supreme Court of Kentucky

Brief of The National Legal Aid And Defender Association As Amicus Curiae

---

INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association (NLADA) is a private, non-profit, national membership organization headquartered in Washington, D.C. whose purpose is to ensure the availability of quality legal services in

civil and criminal cases to all persons unable to retain counsel. Specifically, NLADA represents approximately 1,753 programs engaged in providing representation to indigents in civil cases, and 586 defender offices engaged in providing representation to indigents accused of criminal offenses. The membership of NLADA, therefore, comprises most public defender offices and legal service agencies around the nation, as well as assigned counsel plans and private practitioners.

The NLADA is vitally interested in ensuring that the indigent criminal defendants its members represent are guaranteed their right to be tried by fair and impartial juries. In this case the Court will be deciding whether the fair cross section requirement of the Sixth Amendment, which is one of the means by which the impartiality of the jury is maintained, is violated where

prosecutors employ the peremptory challenge to eliminate the possibilty of representation of a racial minority on the jury. The NLADA urges this Court to recognize that the peremptory challenge can become an obstacle to the ability of the accused to be tried by a jury of his peers and to outlaw the practice of the discriminatory use of the challenge to restore the confidence of the public and the accused in the fairness of the jury system.

SUMMARY OF ARGUMENT

A prosecutor's use of the peremptory challenge to exclude jurors solely on the basis of race interposes an obstacle to the possibility of the accused obtaining a representative cross section of the community on a jury in violation of the Sixth and Fourteenth Amendments. No significant state interest exists which could justify

allowing unrestricted use of the peremptory challenge because the continued existence of the unrestricted right of peremptory challenge is not essential to the ability of the prosecution to select fair and impartial jurors. Recognition of the impermissibility of a prosecutor's discriminatory use of the peremptory challenge will not cause any undue burden on the judicial system as demonstrated by the experience of the California and Massachusetts courts.

ARGUMENT

THE SIXTH AND FOURTEENTH AMENDMENTS PROHIBIT THE USE OF THE PEREMPTORY CHALLENGE TO RESTRICT UNREASONABLY THE POSSIBILITY THAT THE PETIT JURY WILL COMPRISE A FAIR CROSS SECTION OF THE COMMUNITY.

A. The Sixth and Fourteenth Amendments Guarantee An

Accused The Possibility Of A Petit Jury Representative Of A Cross Section Of The Community.

The American tradition of trial by jury necessarily contemplates a jury drawn from a fair cross section of the community. Thiel v. Southern Pacific Co., 328 U.S. 218, 220 (1945). The exclusion of elements of the community from participation contravenes the very idea of a jury composed of the peers or equals of the person whose rights it is selected or summoned to determine. Ballew v. Georgia, 435 U.S. 223, 237 (1978). A State cannot, consistent with due process, subject defendant to trial by a jury selected in an arbitrary or discriminatory manner. Such procedures cast doubt on the integrity of the whole judicial process, as well as creating the appearance of bias in the decision of individual cases and increasing the risk of actual bias as well. Peters v. Kiff, 407

U.S. 493, 402, 503 (1972). Consistent with these principles this Court should hold that a prosecutor's discriminatory use of the peremptory challenge to exclude jurors on the basis of their race violates the Sixth and Fourteenth Amendments.

While defendants are not entitled to a jury of any particular composition and no requirement exists that petit juries actually chosen must mirror the community and reflect the various groups in the population, Taylor v. Louisiana, 419 U.S. 522, 538 (1975), the Sixth Amendment comprehends a jury selected in accordance with procedures that provide a fair possibility for obtaining a representative cross section of the community. Williams v. Florida, 399 U.S. 78, 100 (1970); Taylor, 419 U.S. at 528. Trial by a jury of less than six persons violates the Sixth Amendment because it decreases the opportunity for meaningful and appropriate

representation of a cross section of the community. Ballew, 435 U.S. at 237. Permitting the prosecution to exercise its peremptory challenges to excuse prospective jurors on the basis of race alone similarly violates the fair cross section requirement because it presents no less an obstacle to the possibility of minority representation on the jury.

That the Sixth Amendment is violated not only when identifiable segments of the community are excluded from the venire but also when they are prevented from participating in the deliberative process as petit jurors is apparent from this Court's recognition in Taylor that Louisiana's special exemption for women was unconstitutional because it operated to exclude them from petit juries, 419 U.S at 538, not merely because they were excluded from the jury pool. Selection of a jury from a pool

drawn from a fair cross section of the community is not an end in itself, but contemplates the possibility that the petit jury will be similarly comprised. The fair cross section requirement would be illusory if no restriction existed on the ability of the prosecution to interpose an obstacle to minority representation on the petit jury so long as minorities were not excluded from the jury venire.

Recognition that the fair cross section requirement is applicable to the petit jury is compatible with the constitutional concept of a jury trial. The purpose of a jury is to guard against the exercise of arbitrary power by making available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. Just as this prophylactic purpose is

not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool, Taylor, 419 U.S. at 530, neither is it served if jurors are excluded from the petit jury on the basis of their race. The counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any case. Ballew, 435 U.S. at 234. If the discriminatory use of the peremptory challenge is sustained, the counterbalancing envisioned by the fair cross section requirement cannot occur and the possibility of application of the common sense of the community to the facts of the case is diminished. The broad representative character of the jury must be maintained as an assurance of diffused impartiality. Taylor, 419 U.S. at 530.

Community participation in the administration of criminal law is also critical to public confidence in the fairness of the criminal justice system. Taylor, 419 U.S. at 530. When the public perceives that the prosecution is determined to employ its peremptory challenges to exclude a racial group from participation on the jury, misgivings will inevitably arise regarding the quality of justice being sought, no less than when identifiable groups are excluded from jury service by an automatic exemption. See United States v. Leslie, ___F.2d___ (No. 83-3719, 5th Cir., April 10, 1985), where the Court exercised its supervisory power to prohibit the prosecution's use of its peremptory challenges for unjustifiable, racially discriminatory reasons because approval of the practice undermines public confidence in the judicial system.

Exclusion of persons from service on juries harms not only the defendant and the public, but also other members of the excluded class. It denies that class of potential jurors the privilege of participating equally in the administration of justice and it stigmatizes the whole class, even those who do not wish to participate, by declaring them unfit for jury service and thereby putting a brand upon them, affixed by law, an assertion of their inferiority. Peters, 407 U.S. at 499.

B. No Significant State Interest Justifies A Prosecutor's Racially Discriminatory Use Of The Peremptory Challenge.

If the use of the peremptory challenge to exclude jurors on the basis of race constitutes an infringement on the constitutional right to a jury drawn from a fair cross section of the community, the State

bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest which is manifestly and primarily advanced by that aspect of the jury selection process that results in the disproportionate exclusion of a distinctive group. Duren v. Missouri, 439 U.S. 357, 367, 368 (1979). The right to a proper jury cannot be overcome on mere rational grounds as can an equal protection challenge such as was made in Swain v. Alabama, 380 U.S. 202 (1965). Taylor, 419 U.S. at 534.

The exclusion of a racial group from service on a jury by peremptory challenge cannot be excused on the ground that to disallow this practice would be to emasculate the right to peremptory challenge. The right of peremptory challenge being a statutory creation, the interest in its preservation cannot be relied upon to justify diluting

the quality of community judgment represented by the jury. Where the Constitution and a statute are in conflict, the Constitution prevails. Marbury v. Madison, 1 Cranch 137 (1803). Moreover, the right of peremptory challenge will continue to be available to the prosecutor who does not exercise challenges in a racially discriminatory manner. Disallowing a prosecutor's use of the peremptory challenge on the basis of race alone no more abolishes the peremptory challenge than does this Court's decision in Swain: in either instance the trial court controls the use of the peremptory challenge only if the prosecutor employs the challenge so as to violate the Constitution. Consideration should also be given to the fact that survival of the peremptory challenge is not indispensible to an acceptable judicial system. So long as challenges for cause are available, the parties have adequate means

for selecting a fair and impartial jury.

Neither can the discriminatory use of challenges be justified on the basis of the assumption that Black jurors are necessarily biased in favor of Black defendants. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury. Thiel, 328 U.S. at 220. Since prosecutors are able to make individualized judgments as to the qualifications of white jurors, no hardship results if prosecutors are required to make the same kind of judgments as to Black jurors. If the fact that the defendant is Black and the complaining witness is white does not create any significant likelihood that racial prejudice will infect the trial

so as to require that the jurors be voir dired specifically about racial prejudice, Ristaino v. Ross, 424 U.S. 589 (1976), then the fact that both the accused and a prospective juror are of the same racial background does not create any significant likelihood that racial affinity will affect their judgment. The convenience of the assumption that a Black juror will be partial to a Black defendant cannot justify the exclusion of the juror by peremptory challenge any more than the administrative convenience of the automatic exemption could justify the exclusion of women in Taylor.

C. Workable Procedures That Have Been Successfully Implemented Provide An Appropriate Remedy Which Would Result In No Undue Burden On The Trial Or Reviewing Courts.

Criticism has been made that disallow-

ance of a prosecutor's use of peremptory challenges on racial grounds is compatible with certain practical considerations, especially the "potential for stretching out criminal trials that are already too long, by making the voir dire a Title VII proceeding in miniature." United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984). An examination of the remedy proposed and successfully implemented by various courts reveals such criticism to be unwarranted.[1]

First, a presumption would exist that the prosecutor was employing his peremptory challenges in a constitutionally permissible manner. Commonwealth v. Soares, 377 Mass.

---

[1] Assuming, arguendo, that violation of a constitutional right could be overlooked or ignored because of the added burden which would result to the judicial process if a remedy were provided or the violation not permitted to occur.

461, 387 N.E.2d 499, 517 (1979); People v. Wheeler, 22 Cal.3d 253, 148 Cal.Rptr. 890, 583 P.2d 748 (1978). If the defendant believes the prosecutor is using his challenges to exclude jurors on the basis of race, he must raise the point in timely fashion, make as complete a record of the circumstances as feasible and must establish a prima facie case of such discrimination to the satisfaction of the trial court. Wheeler, 583 P.2d at 764. A prima facie case consists of a demonstration that the jurors being peremptorily challenged are Black and that a likelihood exists that they are being challenged on the basis of their race. Soares, 387 N.E.2d at 517. The Wheeler Court gave the following description of the kind of evidence which might satisfy the defendant's burden:

> ...The party may show that his opponent has struck most or all of the members of the identified group from the venire, or his used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic - their membership in the group - and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly...the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention. 583 P.2d at 764.

Both the Massachusetts and California Supreme Court have expressed confidence in the ability of trial judges to weigh this evidence and distinguish a true case of

discrimination by peremptory challenge from a spurious claim interposed simply for purposes of harrassment or delay, given trial courts' extensive experience with jury empanelment, powers of observation, knowledge of local conditions, familiarity with attorneys on both sides and broad judicial experience. Wheeler, 583 P.2d at 764; Soares, 387 N.E.2d at 517.

Both the Massachusetts and California courts thus appropriately give much deference to the trial judge's assessment of whether the presumption of proper use of the peremptory challenge has been rebutted. The mere number of jurors challenged by the prosecution in and of itself may not be sufficient to rebut the presumption of proper use of challenges if the trial judge's judgment is that the numbers alone are not compelling. See Commonwealth v. Robinson, 382 Mass. 189, 415

N.E.2d 805 (1981) (three of four Blacks excluded but record otherwise insufficient to rebut presumption); Commonwealth v. Benbow, 16 Mass.App. 970, 452 N.E.2d 1164 (1983) (presumption not rebutted by fact that of ten Blacks on the venire, prosecution challenged four, defense two and two served on the jury); People v. Rousseau, 129 Cal. App. 3d 526, 179 Cal.Rptr. 892 (1982)(mere statement that only two Blacks on venire and prosecution excused both insufficient to sustain defense burden of rebutting presumption). Of course, as the number of a particular group who are challenged grows larger, the presumption of proper use of the peremptory challenge grows weaker. Commonwealth v. Gagnon, 16 Mass.App. 110, 449 N.E.2d 686 (1983). But it is not essential to demonstrate that the prosecutor has engaged in a pattern of conduct. Dismissal of one member of the banished group

is as repugnant as dismissal of all but one of its members. Commonwealth v. DiMatteo, 12 Mass.App.547, 427 N.E.2d 754, 758 (1981).

If the court finds a prima facie case of discrimination has been made, the burden shifts to the prosecution to demonstrate the juror was not struck on racial grounds. The showing need not rise to the level of a challenge for cause. Wheeler, 583 P.2d 764, 765; Soares, 387 N.E.2d 517. The trial judge retains discretion and reviewing courts will rely on his good judgment to distinguish between bona fide and belatedly contrived sham excuses. Wheeler, 583 P.2d at 765. The distinction to be drawn is between good and bad faith, not good and bad explanations. Commonwealth v. Thomas, 19 Mass.App. 1, 471 N.E.2d 376 (1984). The prosecutor may also support his showing by the totality of circumstances, e.g., it is relevant that he

challenged similarly situated white jurors on identical or comparable grounds in the course of the same voir dire. Wheeler, 583 P.2d at 765.

Reviewing courts, mindful of the fact that the trial judge is in a better position to judge the motivations of the parties, give deference to the trial judge's finding with respect to whether the presumption of proper use has been rebutted and whether the prosecutor is making proper use of his challenges, unless his finding is unsupported by the record. See People v. Randle, 130 Cal.App.3d 286, 181 Cal.Rptr. 745 (1982); People v. Harvey, ___Cal.App.3d___, 208 Cal.Rptr. 910 (1984); People v. Walker, 157 Cal.App.3d 1060, 205 Cal.Rptr. 278 (1984); Commonwealth v. Joyce, 18 Mass.App. 417, 467 N.E.2d 214 (1984); Commonwealth v. Kelly, 10 Mass.App. 847, 406 N.E.2d 1327 (1980);

Commonweath v. Walker, 379 Mass. 297, 397 N.E.2d 1105 (1979). If, however, the trial judge fails to make a sincere and reasoned evaluation of the genuiness of the prosecution's explanation, relief will be granted the accused on appeal. People v. Hall, 35 Cal.3d 161, 197 Cal.Rptr. 71, 672 P.2d 854 (1983).

The task delegated to the trial judge of discerning the intent of the prosecutor is not an impossible one. As noted in Oregon v. Kennedy, 456 U.S. 667, 656 (1982), it merely calls for the court to make a finding of fact. Inferring intent from objective facts and circumstances is a familiar process in our criminal justice system, and is similar to the judgments trial judges routinely make in judging the credibility of witnesses or the good or bad faith of the prosecution.

No reason exists to conclude that the solution proposed and followed in Wheeler and Soares is unworkable. The California Supreme Court noted recently in response to such a complaint by the prosecution:

> The People have not produced, or called our attention to, any empirical evidence in support of their criticisms of Wheeler. There have been three published opinions of the Court of Appeal since Wheeler and none of these lends support to the People's claims. In particular, the assumption underlying some articles critical of Wheeler (e.g. Younger, Unlawful Peremptory Challenges, supra, 7 Litigation 23) and echoed by the People that restricting the exercise of peremptory challenges to proscribe those prompted by group bias may eliminate the "hunch" challenge is without demonstrable merit. A prosecutor may act freely on the basis of "hunches," unless and until these acts create a prima facie case of group bias, and even then he may rebut the inference. Hall, 672 P.2d at 859.

If this Court makes it clear that use of the peremptory challenge to practice

racial discrimination will not be tolerated, the frequency with which a trial court will be required to distinguish between bona fide and discriminatory use of the peremptory challenge will undoubtedly be reduced. The threat of mistrial or loss of a conviction will deter misuse of the challenge and the vast majority of prosecutors will obligingly conform their conduct to the law.

The refusal or neglect of the trial judge to perform the function of assessing the validity of the prosecutor's use of peremptory challenges may in some cases result merely in remand for a hearing before the trial judge. In other instances this procedure may not be preferable if due to passage of time it is unrealistic to expect the prosecutor to recall in greater detail the reasons for his exercise of his challenges or the trial court to assess those

challenges, which would demand that he be available and able to recall the circumstances of the case and the manner in which the prosecutor examined the venire and exercised his other challenges. Hall, 672 P.2d at 860, People v. Allen, 23 Cal.3d 286, 152 Cal.Rptr. 454, 590 P.2d 30, 35 n. 4 (1979).

CONCLUSION

The practice of employing peremptory challenges to prevent an accused from obtaining a jury representative of the community violates the fair cross section requirement of the Sixth Amendment and should be condemned by this Court. The procedures followed by the California and Massachusetts courts, which have been tested by time and proven to be a workable remedy, should be

adopted by this Court as the solution to discontinue further abuse of the peremptory challenge by prosecutors. Failure or neglect of a trial court to discharge its responsibility to regulate, if warranted, a prosecutor's use of peremptory challenges, justifies granting the defendant relief from his conviction so obtained.

Respectfully submitted,

PATRICIA UNSINN
Assistant Appellate Defender
Office of the State Appellate Defender
State of Illinois Center
100 West Randolph Street
Suite 5-500
Chicago, Illinois 60601
(312) 793-5472

Office - Supreme Court, U.S.
FILED
JUN 28 1985
ALEXANDER L. STEVAS
CLERK

No. 84-6263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES KIRKLAND BATSON,

Petitioner,

—v.—

COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

AMICUS CURIAE BRIEF FOR ELIZABETH HOLTZMAN, DISTRICT ATTORNEY, KINGS COUNTY, NEW YORK

ELIZABETH HOLTZMAN
District Attorney

BARBARA D. UNDERWOOD
Assistant District Attorney
Counsel of Record

PETER A. WEINSTEIN
EVAN WOLFSON
Assistant District Attorneys

Kings County District Attorney's Office
210 Joralemon Street
Brooklyn, New York 11201
(718) 802-2156
Counsel for Amicus Curiae

June 28, 1985

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the sixth and fourteenth amendments prohibit the use of the peremptory challenge to exclude prospective jurors solely on the basis of race.

2. Whether the ban on the use of the peremptory challenge to discriminate because of race should extend to defense counsel as well as to prosecutors.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
AUTHORITY TO FILE BRIEF AMICUS CURIAE	1
STATEMENT OF INTEREST OF AMICUS CURIAE	2
SUMMARY OF ARGUMENT	3
POINT I	
RACE DISCRIMINATION IN JURY SELECTION OCCURS FREQUENTLY AND OPENLY, AND VIOLATES THE CONSTITUTIONAL RIGHTS OF DEFENDANTS, EXCLUDED JURORS, AND THE PUBLIC	5
A. *Swain* Has Been Misconstrued as a License to Use Peremptory Challenges to Exclude Jurors on the Basis of Race	7
B. The Race-Based Use of Peremptory Challenges Violates the Sixth and Fourteenth Amendment Rights of Defendants, Jurors, and the Public	13
Defendants	13
The Public	16
Excluded Jurors	17

PAGE

POINT II

THE SAFEGUARDS SET FORTH IN *SWAIN* FOR DETECTING AND RECTIFYING UNLAWFUL DISCRIMINATION IN THE USE OF THE PEREMPTORY CHALLENGE HAVE PROVEN INEFFECTIVE AND UNWORKABLE. BY CONTRAST, THE *WHEELER* PROCEDURE EFFECTIVELY PRESERVES THE PEREMPTORY CHALLENGE AS A MEANS OF STRIKING BIASED JURORS WHILE PREVENTING THEIR UNCONSTITUTIONAL USE TO ELIMINATE PEOPLE SOLELY BECAUSE OF RACE. 19

POINT III

THE BAN ON RACE DISCRIMINATION IN THE EXERCISE OF PEREMPTORY CHALLENGES MUST EXTEND TO DEFENSE COUNSEL AS WELL AS TO PROSECUTORS. 24

CONCLUSION..... 30

TABLE OF AUTHORITIES

Cases: PAGE

Adams v. Texas, 448 U.S. 38 (1980) 15

Andrews v. State, 438 So.2d 480 (Fla. Dist. Ct. App. 1983) 26

Ballard v. United States, 329 U.S. 187 (1946) 14, 17, 27

Ballew v. Georgia, 435 U.S. 223 (1978) 15, 27

Carter v. Jury Commission, 396 U.S. 320 (1970).....5, 17, 18, 27

Casteneda v. Partida, 430 U.S. 482 (1977)..... 10

Commonwealth v. Brown, 11 Mass. App. Ct. 288, 416 N.E.2d 218 (1981)..... 25

Commonwealth v. DiMatteo, 12 Mass. App. Ct. 547, 427 N.E.2d 754 (1981), *appeal denied*, 385 Mass. 1101, 440 N.E.2d 1173 (1982)..... 25

Commonwealth v. Little, 384 Mass. 262, 424 N.E.2d 504 (1981) 25, 29

Commonwealth v. Perry, 15 Mass. App. Ct. 932, 444 N.E.2d 1298, *appeal denied*, 388 Mass. 1105, 448 N.E.2d 766 (1983)..... 25

Commonwealth v. Reid, 384 Mass. 247, 424 N.E.2d 495 (1981) 29

Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979).....16, *passim*

Craig v. Boren, 429 U.S. 190 (1976) 11, 12

Duncan v. Louisiana, 391 U.S. 145 (1968)..... 4, 7

Duren v. Missouri, 439 U.S. 357 (1979) 10

Edwards v. California, 314 U.S. 160 (1941)..... 11

Faretta v. California, 422 U.S. 806 (1975) 27

Frazier v. United States, 335 U.S. 497 (1948) 29

PAGE

Gannett Co. v. DePasquale, 443 U.S. 368 (1979) 25

Gilliard v. Mississippi, 104 S. Ct. 40 (1983) 8

Glasser v. United States, 315 U.S. 60 (1945) 14

Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) 15

Harris v. Texas, 104 S. Ct. 3556 (1984) 15

In re Winship, 397 U.S. 358 (1970) 27

McCray v. Abrams, 576 F. Supp. 1244 (E.D.N.Y. 1983), *aff'd in part and vacated in part*, 750 F.2d 1113 (2d Cir. 1984), *petition for cert. filed*, Mar. 4, 1985 ..... *passim*

New Jersey v. Gilmore, No. A-870-82T4 (Super. Ct. Mar. 8, 1985) 20

Nixon v. Herndon, 273 U.S. 536 (1927) 28

Norris v. Alabama, 294 U.S. 587 (1935) 18

People v. Davis, 95 Ill.2d 1, 447 N.E.2d 353, *cert. denied*, 104 S. Ct. 507 (1983) 20

People v. Fuller, 136 Cal. App.3d 403, 186 Cal. Rptr. 283 (1982) 25

People v. Hall, 35 Cal.3d 161, 672 P.2d 854, 197 Cal. Rptr. 71 (1983) 22

People v. McCray, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982), *cert. denied*, 461 U.S. 961 (1983) 2, 7, 16, 20, 23, 29

People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (2d Dep't 1981) 2, 20, 23

People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978) ..... 16, *passim*

Peters v. Kiff, 407 U.S. 493 (1972) 4, 6, 14

Plyler v. Doe, 457 U.S. 202 (1982) 12

Polk County v. Dodson, 454 U.S. 312 (1981) 28

PAGE

Roman v. Abrams, No. 85-Civ-0673-CLB (S.D.N.Y. May 15, 1985) 16, 23

Rosales-Lopez v. United States, 451 U.S. 182 (1981) ... 29

Rose v. Mitchell, 443 U.S. 545 (1979) 27, 29

Shelley v. Kraemer, 334 U.S. 1 (1948) 28

Simpson v. Commonwealth, No. 81-1193-S (D. Mass. July 20, 1984) 22

Singer v. United States, 380 U.S. 24 (1965) 16, 25

Smith v. Texas, 311 U.S. 128 (1940) 18

State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980) 20

State v. Neil, 457 So.2d 481 (Fla. 1984) 17, 20, 23, 25

Stilson v. United States, 250 U.S. 583 (1919) 29

Strauder v. West Virginia, 100 U.S. 303 (1880) 10, 13, 16, 18, 27

Swain v. Alabama, 380 U.S. 202 (1965) ..... *passim*

Taylor v. Louisiana, 419 U.S. 522 (1975) 6, 13, 14, 15, 17

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) 22

Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) 6

United States v. Childress, 715 F.2d 1313 (8th Cir. 1983) (en banc), *cert. denied*, 104 S. Ct. 744 (1984) 8, 20

United States v. Jackson, 696 F.2d 578 (8th Cir. 1982), *cert. denied*, 460 U.S. 1073 (1983) 20

United States v. Leslie, 759 F.2d 366 (5th Cir.), *rehearing en banc granted*, No. 83-3719 (May 14, 1985) 20

United States v. Newman, 549 F.2d 240 (2d Cir. 1977) .. 11

Weathersby v. Morris, 708 F.2d 1493 (9th Cir. 1983) ... 7

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 12

PAGE

Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980) 12

Witherspoon v. Illinois, 391 U.S. 510 (1968) 15

United States Constitutional Provisions:

Sixth Amendment ..... *passim*

Fourteenth Amendment ..... *passim*

Other Authorities:

Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 Stan. L. Rev. 545 (1975) 10

Brown, McGuire & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*? 14 N. Eng. L. Rev. 192 (1978) 9

Ciolli, *Indicting the Process of Selecting Jurors*, Newsday, Mar. 8, 1983 9

Comment, *A Case Study of Peremptory Challenges: A Subtle Strike at Equal Protection and Due Process*, 18 St. Louis L. J. 662 (1974) 8

De Tocqueville, *Democracy in America*, Vol. I (Vintage 1954) 17

Kelner, *Jury Selection: The Prejudice Syndrome*, N.Y. State Bar J. 35, Feb. 1984 9

Miami *Times*, June 23, 1983, col. 1, p. 1 26

Mosk, J., Letter to New York *Times*, A24, col. 3 (June 24, 1983) 22

Note, *The Defendant's Challenge to a Racial Criterion in Jury Selection*, 74 Yale L. J. 919 (1965) 10

Powell, *Jury Trials of Crimes*, 23 Wash. & Lee L. Rev. 1 (1966) 17

PAGE

Saltzburg and Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md. L. Rev. 337 (1982) 8, 10, 20

Younger, *Unlawful Peremptory Challenges*, 21 Judges' J. 27 (Winter 1982)..... 9, 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-6263

JAMES KIRKLAND BATSON,

Petitioner,

—v.—

COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

AMICUS CURIAE BRIEF FOR ELIZABETH HOLTZMAN, DISTRICT ATTORNEY, KINGS COUNTY, NEW YORK

AUTHORITY TO FILE BRIEF AMICUS CURIAE

Elizabeth Holtzman, District Attorney of Kings County, New York, files this brief *amicus curiae* with consent of the attorneys for the petitioner and the respondent, pursuant to Rule 42(1). Moreover, she is the authorized law officer of a political subdivision of a state, and therefore also files this brief *amicus curiae* pursuant to Rule 42(4).

STATEMENT OF INTEREST OF AMICUS CURIAE

Elizabeth Holtzman is the District Attorney of Kings County, New York. For nearly four years, criminal prosecutions in that county have been subject to a judicially imposed ban on the use of the peremptory challenge to exclude potential jurors on the basis of race. That judicial rule was first imposed, in a Kings County case, as a matter of state constitutional law, in *People v. Thompson*, 79 A.D.2d 87, 435 N.Y.2d 739 (2d Dep't. 1981). The District Attorney declined to appeal that decision, and promulgated an office policy prohibiting the use of the peremptory challenge to exclude jurors on the basis of race, sex, religion, or national origin. Nearly two years later, in another Kings County case, the New York Court of Appeals overruled that decision over the objection of the District Attorney. *People v. McCray*, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982), *cert. denied*, 461 U.S. 961 (1983). At that time, the District Attorney reaffirmed her office policy prohibiting such discrimination.

One year later, the legal ban was reestablished, this time as a matter of federal constitutional law, in *McCray v. Abrams*, 576 F. Supp. 1244 (E.D.N.Y. 1983). In that federal *habeas corpus* proceeding, the District Attorney represented the New York State Attorney General, pursuant to an agreement with that office. The District Attorney continued to urge the adoption of a constitutional ban on race discrimination in the use of the peremptory challenge, contesting only the claim that discrimination had occurred in that particular case. The United States Court of Appeals affirmed the determination that the Constitution prohibits such discrimination, and remanded for an evidentiary hearing. *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984). The District Attorney filed a petition for *certiorari*, on behalf of respondent Attorney General Abrams, to resolve the conflict between the state and federal courts, to review the procedural mechanism for enforcing the constitutional rule, and to urge the extension of the ban to defense counsel. That petition is still pending in this Court, *Abrams v. McCray*, No. 84-1426, filed Mar. 4, 1985.

Thus, *amicus* has had almost four years of experience with both judicial and internal administrative prohibitions on the use of the peremptory challenge to exclude potential jurors on the basis of race. Based on that experience, *amicus* has found that the ban is consistent with both effective law enforcement and efficient judicial administration, and urges this Court to adopt it. Moreover, *amicus* has observed that defense counsel as well as prosecutors frequently use the peremptory challenge to exclude potential jurors on the basis of race. Such discrimination by defense counsel is equally widespread, equally threatening to constitutional values, and equally amenable to judicial control. For these reasons, *amicus* urges the court to hold that the ban applies not only to prosecutors, but also to defense counsel.

SUMMARY OF ARGUMENT

Intentional race discrimination in jury selection undermines both the integrity of the judicial system, and public confidence in the fairness of jury trials. It violates the sixth and fourteenth amendment rights of defendants, of excluded jurors, and of the community.

In an unbroken line of decisions, this Court has condemned such unconstitutional discrimination. The question presented by this case is whether courts have the power to remedy race discrimination when it occurs not at the earlier stages of jury selection already addressed by this Court, but rather at the stage when individual jurors are excluded by the exercise of peremptory challenges.

Twenty years ago, in *Swain v. Alabama*, 380 U.S. 202 (1965), this Court held that courts could not, under the equal protection clause, enforce a ban on race discrimination in the use of the peremptory challenge unless such discrimination occurred systematically, in case after case, over a period of time. *Swain* never authorized race discrimination in the use of peremptory challenges, even in an individual case; it merely placed the isolated case of discrimination beyond the scope of

judicial review because of a presumption of prosecutorial good faith and a prudential concern for orderly judicial administration. The remedial approach of *Swain* was based on several premises which have been refuted by the experience of the past twenty years.

First, *Swain* was decided on the erroneous assumption that genuine invidious race discrimination in jury selection could be controlled by the limited remedy announced in that case. The experience of *amicus* and the reported cases show to the contrary, however, that both prosecutors and defense counsel frequently and openly engage in the practice of invidious race discrimination, to the detriment of potential jurors, defendants, witnesses, and the public at large. Thus, *Swain*'s presumption of good faith in the use of peremptory challenges is no longer tenable, and the remedy it created has failed to accomplish its purpose.

Second, *Swain* was decided on the erroneous assumption that a rule permitting inquiry into the reasons for peremptory challenges would destroy the peremptory challenge altogether, and disrupt the expeditious conduct of trials. The experience of California, Massachusetts, Florida, and New York, however, proves that fear unfounded. In each of these jurisdictions, courts have found in the state constitution a ban on the race-based use of the peremptory challenge. The peremptory challenge has survived the ban on its discriminatory use, and the rule has proven both effective and consistent with the orderly administration of justice.

Third, this Court decided *Swain* without addressing the constitutional significance of a jury drawn from a fair cross-section of the community, or the equal protection rights of jurors who are excluded by reason of their race. Several years after the decision in *Swain*, this Court held the fair cross-section requirement of the sixth amendment applicable to the states, *Duncan v. Louisiana*, 391 U.S. 145 (1968), and made clear that the ban on race discrimination in jury selection is part of due process as well, *Peters v. Kiff*, 407 U.S. 493 (1972). Moreover, in 1970, the Court recognized that not only defendants, but also excluded jurors and the community at large,

have a legally cognizable right against discrimination in jury selection. *Carter v. Jury Commission*, 396 U.S. 320 (1970). If this jurisprudence had existed in 1965, when *Swain* was decided, the result might well have been different.

It is time for this Court to rid the judicial system of intentional discrimination in jury selection. This Court should hold that both the sixth amendment and the equal protection clause bar race discrimination by all parties to the jury selection process, at every stage of that process. The Court should set forth a reasonable procedure for enforcing that prohibition, should hold that the ban applies to defense counsel as well as to prosecutors, and should remand the instant case to the state courts for reconsideration in light of its holding.

POINT I

RACE DISCRIMINATION IN JURY SELECTION OCCURS FREQUENTLY AND OPENLY, AND VIOLATES THE CONSTITUTIONAL RIGHTS OF DEFENDANTS, EXCLUDED JURORS, AND THE PUBLIC.

Invidious race discrimination deserves protection in no area of society, least of all in the administration of justice. The Constitution cannot permit an attorney to stand in the doorway of the jury room to block potential jurors because of the color of their skin. Historically, this Court has played a key role in striking down pernicious and unfair classifications which interfere with each individual's fullest participation in American society. Faced now with a claim of intentional race discrimination within the judicial system itself, this Court should forbid the abuse of peremptory challenges to bar jurors simply because of their race.[1]

Race discrimination in jury selection denies the defendant and the state a fair trial by a representative jury, and under-

---

1 Discrimination based on religion, sex, or ethnic origin is as offensive as discrimination because of race. The same logic and concerns mandating a constitutional ban on race-based discrimination in jury selection apply to these other pernicious classifications. Because *Batson* presents a claim of race discrimination, this brief focuses on that issue alone.

mines public confidence that justice is done. Shaping a jury by excluding individuals solely on the basis of race destroys its "diffused impartiality" and representative spirit. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975), *citing Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting). As a result, the jury is deprived of "a perspective on human events that may have unsuspected importance in any case that may be presented." *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972).

"[T]he jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it." *Taylor*, 419 U.S. at 529 n.7. Juries "play a political function in the administration of the law;" when parties are permitted to challenge arbitrarily members of disfavored groups, biased juries are the result—"biased in the sense that they reflect a slanted view of the community they are supposed to represent." *Id.* When people see racism, not blind justice, in the courts, the judgments and judicial processes lose their legitimacy and moral power.

Race discrimination in jury selection also violates the fundamental constitutional principle that people may not be judged by the color of their skin. "[P]ersons may not be excluded from juries on account of race. Such exclusions are plainly unlawful and deserving of condemnation." *Peters*, 407 U.S. at 507 (Burger, C.J., dissenting). "Jury competence is an individual matter rather than a group or class matter . . . [and to] disregard [that fact] open[s] the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." *Thiel*, 328 U.S. at 220. Jurors "should be selected as individuals, on the basis of individual qualifications, and not as members of a race." *Swain v. Alabama*, 380 U.S. 202, 204 (1965). It is time for this Court to enforce its injunctions against intentional race discrimination in the administration of justice by curtailing the perversion of the peremptory challenge.

A. *Swain* Has Been Misconstrued as a License to Use Peremptory Challenges to Exclude Jurors on the Basis of Race.

In *Swain*, this Court recognized the historical roots of peremptory challenges, but nevertheless reaffirmed that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." [2] 380 U.S. at 204. Concerned with the preservation of peremptory challenges as a tool for justice, the Court concluded that, as a matter of procedure, the use of peremptory challenges in any particular case must be presumed valid. The *Swain* court conceded, however, that circumstances might arise where "the purposes of the peremptory challenge are being perverted." 380 U.S. at 224; *see McCray v. New York*, 461 U.S. 961, 964 (1983) (Marshall, J., dissenting from denial of *certiorari*). Thus, nothing in *Swain*, not even its presumption of prosecutorial good faith, could have been intended as a license to discriminate on the pernicious and condemned basis of race.[3]

Nevertheless, courts, attorneys, and commentators have construed *Swain* to permit and even encourage the use of racial stereotypes in picking or striking jurors. Judges have explicitly

---

2 The *Swain* court did not address the sixth amendment's prohibition of race-based discrimination in jury selection because that amendment was not held binding upon the states until three years later, in *Duncan v. Louisiana*, 391 U.S. 145 (1968). *See McCray*, 750 F.2d at 1124. In any event, even were this Court's decision in *Swain* deemed to embrace sixth amendment analysis, *see, e.g., McCray*, 750 F.2d at 1136 (Meskill, dissenting), nothing in *Swain* was meant to authorize discrimination against jurors because of their race, under either the sixth or fourteenth amendments.

3 The Ninth Circuit recognized in *Weathersby v. Morris*, 708 F.2d 1493 (9th Cir. 1983), that *Swain* limited only the remedy, and not the right against discrimination, to cases of systematic discrimination in case after case. In *Weathersby*, the prosecutor had voluntarily given his reasons for exercising peremptory challenges against black potential jurors. The court held that *Swain*'s presumption of good faith had no place in such circumstances, and that instead the court should evaluate those reasons to determine whether or not the prosecutor had engaged in unconstitutional race discrimination.

remarked that the *Swain* presumption of validity "was definitely unrealistic [and that this] Court probably intended only to state a principle but never meant for the principle to be implemented." *E.g.*, Comment, *A Case Study of Peremptory Challenges: A Subtle Strike at Equal Protection and Due Process*, 18 St. Louis L.J. 662, 680 (1974) (quoting a state trial judge). Some judges have interpreted *Swain* to confer upon an attorney "not only a right but an obligation to challenge a prospective juror" on the basis of race or other "broad generalization[s] which may not in fact be true." *See, e.g.*, *McCray v. Abrams*, 750 F.2d 1113, 1138 (2d Cir 1984) (Meskill, J., dissenting).

This misinterpretation of *Swain* has led lower courts to adhere to the irrebuttable presumption of valid peremptory challenges, even when the premises of such a presumption have been undercut by evidence of widespread discrimination, and when the need for it has been undercut by the development of a workable procedure for curtailing such abuse without destroying the peremptory challenge.[4] *See, e.g.*, authorities collected in *McCray*, 750 F.2d at 1128 n.6; *see also* cases cited in *Gilliard v. Mississippi*, 104 S. Ct. 40, 42 (1983) (Marshall, J., dissenting from denial of *certiorari*); *United States v. Childress*, 715 F.2d 1313 (8th Cir. 1983) (en banc), *cert. denied*, 104 S. Ct. 744 (1984). *Swain* has come to stand for the proposition it began by expressly refuting, that in the courts of this country, jurors may be chosen or rejected by color.

Attorneys and commentators, too, have misinterpreted *Swain* as a license to discriminate against jurors merely on the basis of their race. *See, e.g.*, Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md. L. Rev. 337, 343 (1982). "The time-honored rule of thumb in jury selection is nothing more than racist or sexist generalizations [including such] stereotypical and fallacious [theories as]: 'All Scandinavians are pro-police,

---

4 Two federal circuits and several state courts have developed effective and efficient procedures to bar the use of race-based peremptory challenges. See discussion in Point II.

all Jews are kind-hearted . . . all blacks will vote to acquit blacks no matter how strong the evidence.' " Ciolli, *Indicting the Process of Selecting Juries*, Newsday, Mar. 8, 1983, Part II, p.2 (quoting Professor Jon Waltz). Professor Irving Younger has noted that a "prospective juror's race" is "at or near the top" of the list of factors influencing a lawyer's juror selection. Younger, *Unlawful Peremptory Challenges*, 21 The Judges' Journal 27, 28 (Winter 1982). Many experts in trial litigation publicly recommend that attorneys exercise their peremptory challenges on the basis of race.[5]

Amicus has spoken with many prosecutors who believe they are entitled to use the peremptory challenge to strike potential jurors on the basis of race, and would do so to the extent this Court permits the practice. Moreover, in the experience of *amicus*, defense counsel frequently exclude jurors on the basis of race, and they do so without inhibition in New York, where the courts have not extended the ban to defense counsel. Because prosecutors and defense counsel have misconstrued *Swain* as a license to challenge jurors on the basis of race, *Swain*'s effort to deal with the problem of discrimination has become part of the problem itself.

---

5 For example, one "checklist for voir dire" advises attorneys to develop "prototypes" and consider excluding people first on the basis of their racial origin and second, on the basis of their religious or national origin. Kelner, *Jury Selection: The Prejudice Syndrome*, N.Y. State Bar J., Feb. 1984, at 35-38. An instruction book for new prosecutors prepared by the Dallas County, Texas, District Attorney's office contained this advice on juror selection:

> III. What to look for in a juror.
>
> A. Attitudes
>
> 1. You are not looking for a fair juror but rather a strong, biased and sometimes hypocritical individual who believes that Defendants are different from them in kind, rather than degree.
> 2. You are not looking for any member of a minority group which may subject him to oppression—they almost always empathize with accused.
> 3. You are not looking for free-thinkers and flower children.

Brown, McGuire, and Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse?*, 14 New Eng. L. Rev. 192, 224 (1978).

The proponents of racial exclusion in jury selection contend that race is an accurate predictor of bias or sympathy, and that for this reason an attorney must be permitted to use peremptory challenges to exclude potential jurors on the basis of race. *See, e.g., McCray*, 750 F.2d at 1138 (Meskill, J., dissenting); Saltzburg & Powers, 41 Md. L. Rev. 337. That argument is fatally flawed for two reasons.

First, it is simply false. "[I]t is fallacious to assume that all persons sharing an attribute of skin color, or of gender or ethnic origin, etc., will *ipso facto* be partial to others sharing that attribute." *McCray*, 750 F.2d at 1121. All whites do not view matters in the same way, nor do all members of any racial minority.

While this truth should be self-evident, empirical support for the proposition is also available. This Court has recognized social science evidence that while some members of minority groups may be sympathetic to members of their own group, others may "respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority," *Casteneda v. Partida*, 430 U.S. 482, 503 (1977) (Marshall, J., concurring). *See also* Babcock, *Voir Dire: Preserving 'Its Wonderful Power,'* 27 Stan. L. Rev. 545, 553, 553 n.30 (1975); *see also* Note, *The Defendant's Challenge to a Racial Criterion in Jury Selection*, 74 Yale L.J. 919, 922-23 (1965). People are more than white or black, and the views and abilities of any individual cannot be accurately foretold by a look at his or her face.

"[As] early as 1880, [this] Court recognized that blacks as a class are no less qualified to sit on juries than whites," *Duren v. Missouri*, 439 U.S. 357, 371 n.* (1979) (Rehnquist, J., dissenting) (citing *Strauder v. West Virginia*, 100 U.S. 303 [1880]), because this Court knew that individual blacks, like individual whites, are capable of the objectivity and fairness that are the prerequisites of a good juror. As the Second Circuit observed:

> Blacks are the major victims of wrongdoers and it is unlikely that they hesitate to convict where the case

> warrants it. All of the members of this Court, hearing the present case, have served more than a decade as judges of the United States District Court for the District of Connecticut. It has been our experience that Black persons, summoned and drawn for jury panels in that court, have been excellent jurors and have shown no predilection to favor or harm any group, class or kind of persons but have judged the facts on the evidence presented in court in the light of the court's charge.

United States v. Newman, 549 F.2d 240, 250 n.8 (2d Cir. 1977).

Clearly, no racial group is inherently more biased or incapable of objectivity than any other. Thus, "[a]ny notion that white persons can be objective in viewing a case on its merits and that blacks *qua* blacks cannot, is particularly objectionable." *McCray*, 750 F.2d at 1131. Race is simply not an accurate predictor of a juror's impartiality or an individual's attitudes and capacities.

Second, even if there were some loose association between race and bias or sympathy, the Constitution would prohibit its use in jury selection. Race is "constitutionally an irrelevance," *Edwards v. California*, 314 U.S. 160, 185 (1941) (Jackson, J., concurring), and generalizations based upon race or other suspect classifications have no place in the judicial process.

Because of the evil which stigmatizing classifications such as race wreak on American society and individual citizens, this Court has refused to permit their use. This Court has correctly discerned in the Constitution a "limiting principle" which forbids certain suspect ways of grouping individuals regardless of "statistically measured but loose-fitting generalities." *Craig*

v. Boren, 429 U.S. 190, 208 n.22, 209 (1976);[6] *see also Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975). Simply put, some classifications are so pernicious, so susceptible to misinterpretation and misuse, so ill-founded, and so antithetical to the American conception of fairness and the dignity of the individual, that they have no place under the Constitution.

The Constitution "was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation" and particularly those "presumptively invidious . . . classifications that disadvantage a 'suspect class'." *Plyler v. Doe*, 457 U.S. 202, 213 (1982). Even if there were some minimal support for race-based prognostications of a juror's potential bias, the tenuous benefits of challenges based on such stigmatizing and harmful classifications cannot outweigh the costs to society in skewed juries, offended jurors, and judicially sanctioned racism.

Those who would interpret *Swain* to authorize the exclusion of jurors on the basis of race-based stereotypes are simply wrong. This Court has never sanctioned the use of peremptory challenges on the basis of racial classifications. Because such discrimination strikes at the heart of the jury system itself, it is important now to restate the message lost in *Swain*, profiting from the experience developed in the state courts and from the

---

6 *Craig* involved a challenge to gender-based discrimination arguably supported by empirical data. In that case, Oklahoma had established different drinking ages for men and women based on statistics tending to show a quantifiable disparity in the incidence of driving while intoxicated. This Court observed that "[e]ven were this statistical evidence accepted as accurate, it nevertheless offers only a weak answer to the equal protection question presented here." 429 U.S. at 201. The *Craig* court demonstrated the intolerability of classing people by religion, sex, or race even in light of certain statistical information, commenting that

> if statistics were to govern the permissibility of state alcohol regulation without regard to the Equal Protection Clause as a limiting principle, it might follow that states could freely favor Jews and Italian Catholics at the expense of all Americans, since available studies regularly demonstrate that the former two groups exhibit the lowest rates of problem drinking [sources omitted] . . . .

Id. at 208 n.22.

developments in sixth and fourteenth amendment jurisprudence over the last twenty years.

B. The Race-Based Use of Peremptory Challenges Violates the Sixth and Fourteenth Amendment Rights of Defendants, Jurors, and the Public.

The race-based use of peremptory challenges violates the rights of at least three different groups of people under two distinct constitutional provisions. It violates the rights of defendants, jurors, and the public at large to freedom from invidious discrimination under the equal protection clause, and to trials by juries drawn from a fair cross-section of the community under the sixth amendment. Each of these groups suffers a distinct injury, and each injury is cognizable under the well-established constitutional precedents of this Court.

Defendants

This Court held in 1880 that a defendant is denied equal protection of the law when tried by a jury from which members of defendant's own group are excluded by reason of race. *Strauder*, 100 U.S. 303. In *Swain*, the Court recognized that the equal protection clause is violated even when the racial exclusion is accomplished by means of the peremptory challenge, so long as the presumption of good faith is overcome by a showing of systematic exclusion in case after case. This Court should abandon *Swain*'s requirement of systematic exclusion, and provide a remedy to any defendant who is the victim of intentional race discrimination in jury selection. *Swain*'s remedy must be extended for two reasons: first, evidence of widespread discrimination shows that *Swain*'s irrebuttable presumption of good faith is not warranted; and second, the equal protection clause prohibits isolated acts of racism as well as systematic race discrimination.

When a defendant is tried by a jury from which a group is systematically excluded, the defendant is also denied the sixth amendment "right to a speedy and public trial by an impartial jury."In *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975), this Court declared "that the American concept of a jury trial contemplates a jury drawn from a fair cross-section of the

community."[7] Thus, the sixth amendment forbids any unreasonable interference with the "fair and undistorted chance" that the jury represent the community. *McCray*, 750 F.2d at 1129. The peremptory challenge may not be used as a means of skewing a jury or stilling the voice of individual jurors solely because of race.

Although *Taylor* dealt with the selection of the venire, clearly the logic and concerns that prompted its injunction against interference with the cross-section extend to the final, critical step of selecting the actual petit jury. *McCray*, 750 F.2d at 1128-29; *see also Childress*, 715 F.2d at 1319 ("The extension of *Taylor v. Louisiana* from the venire to the petit jury has much logical and practical appeal."). Courts that have held otherwise rely on the dictum at the end of *Taylor*, noting that there is obviously "no requirement that petit juries actually chosen must mirror the community," *id.* at 538. *See, e.g.*, cases cited in *McCray*, 750 F.2d at 1128 n.6. But that observation simply recognizes that the Constitution regulates the jury selection process, and not the composition of the jury itself. While an actual cross-section is not required, the Constitution prohibits any selection process that unfairly restricts the possibility of drawing the jury from a fair cross-section of the community.

"[I]n given factual instances, the sixth amendment requirement of cross-sectional representation has been held applicable

---

7 *Taylor* followed a long line of cases in which this Court had affirmed the importance of a fair, representative cross-section. *See, e.g., Glasser v. United States*, 315 U.S. 60, 86 (1945) ("[t]he proper functioning of the jury system and indeed, our democracy itself, requires that the jury be 'a body truly representative of the community' and not the organ of any special group or class"); *Ballard v. United States*, 329 U.S. 187, 193-94 (1946); *Thiel*, 328 U.S. at 220 ("prospective jurors [must] be selected by court officials without systematic and intentional exclusion of [racial and other] groups"); *Peters*, 407 U.S. at 503-04. In *Peters*, even the dissenters "completely agree[d] that juries should not be deprived of the insights of the various segments of the community, for the 'common-sense judgment of a jury' . . . is surely enriched when all voices can be heard." *Id.* at 510-11 (Burger, C.J., dissenting).

to the petit jury." *Grigsby v. Mabry*, 758 F.2d 226, 230 (8th Cir. 1985), *citing Adams v. Texas*, 448 U.S. 38, 50 (1980); *Ballew v. Georgia*, 435 U.S. 223, 236-37 (1978) (five-person jury too small to permit representative cross-section); *Witherspoon v. Illinois*, 391 U.S. 510, 518-23 (1968) (exclusion for cause of jurors opposed to death penalty undermines representativeness). In *Ballew*, this Court refused to permit the state "to deal with the valid venire in a way that . . . limited the possibility that a fair cross-section might be drawn." *McCray*, 750 F.2d at 1129. *Witherspoon* dealt specifically with the challenge stage of the proceedings, and thus indicated this Court's concern with the petit jury itself as well as the venire. 391 U.S. at 518-23.

Were this Court to tolerate the use of any stage in the selection process to decimate systematically and intentionally the representative venire promised in *Taylor*, it would countenance an exception that swallows the rule and eviscerates the significance of the guarantee.[8] While there is no requirement that the "representative character of the venire be carried over to the petit jury," the parties cannot be permitted baselessly or invidiously to eliminate "the possibility of such a carry-over." *McCray*, 750 F.2d at 1129.

The fair cross-section requirement assures that the jury reflects the broad range of human experience and preserves the "subtle interplay of influence" by which diversity leads to the truth. *Taylor*, 419 U.S. at 530. The multiplicity of insights brought by a representative jury promotes a "diffused impartiality" that fulfills the sixth amendment's objective. *Id.* Conversely,

> [w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to

---

8 "When the prosecution employs its peremptory challenges to remove from jury participation all Negro jurors, the right guaranteed [in *Taylor*] is denied just as effectively as it would be had Negroes not been included on the jury rolls in the first place." *Harris v. Texas*, 104 S.Ct. 3556, 3557 (1984) (Marshall, J., dissenting from denial of *certiorari*).

> assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Peters, 407 U.S. at 503-04. Overall impartiality is achieved by allowing the interaction of the diverse beliefs and values jurors bring from their own experiences.

Jurors evaluate evidence in light of their own individual experiences, including the experience of membership in a particular group. While it is impossible to predict the specific impact of that experience on their views, the wholesale exclusion of a group from jury service eliminates an important perspective and permits the jury to become "dominated by the conscious or unconscious prejudices of the majority."[9] *People v. Wheeler*, 22 Cal.3d 258, 276, 583 P.2d 748, 761, 148 Cal. Rep. 890, 902, (1978).

The Public

Not only defendants, but also victims, witnesses, and the general public are harmed by the race-based use of the peremptory challenge. They have an interest equal to that of the defendant in freedom from intentional race discrimination. *See Strauder*, 100 U.S. 303. They likewise have a strong sixth amendment interest in the diffused impartiality of juries which is essential to fair trials. *See Singer v. United States*, 380 U.S. 24 (1965). These rights of the public are discussed more fully below.[10] The important point here is that discrimination in jury selection inflicts real and substantial injury not only on defendants, but on all members of society.

---

9 While it offends the equal protection clause and the sixth amendment to strike any group on the basis of race, it is particularly offensive to strike minority jurors, because it is often possible by this means to eliminate a minority group altogether, *see, e.g., People v. McCray*, 57 N.Y.2d at 555 (Meyer, J., dissenting); *Commonwealth v. Soares*, 377 Mass. 461, 487-88, 387 N.E.2d 499, 516, *cert. denied*, 444 U.S. 881 881 (1979). The majority group, by contrast, cannot ordinarily be eliminated even by a constitutionally offensive effort to do so. *See, e.g., Roman v. Abrams*, No. 85-Civ-0673-CLB (S.D.N.Y. May 15, 1985), discussed below at 23.

10 See discussion in Point III.

The judicial system must not only be fair, it must appear fair. This nation will not soon forget the spectacle of all-white juries acquitting the accused murderers of civil rights workers, whether in the 1960's or the 1980's. When the public perceives the judicial system as tainted by race prejudice, its confidence in that system is destroyed, and the system itself is injured.

Regardless of who does it, "restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Taylor*, 419 U.S. at 530.[11] As this Court stated long ago in considering another instance of unfair exclusion from jury service, "[t]he injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard v. United States*, 329 U.S. 187, 195 (1946). Trial by jury has a unique civic function; it empowers individuals over their officials, educates the citizenry, and reinforces this nation's democratic heritage.[12] In an institution so important and immediate to the people, race prejudice should find no shelter.

Excluded Jurors

"People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." *Carter v. Jury Commission*, 396 U.S. 320, 329 (1970). No citizen of the United States

---

11 Because of these sixth amendment fair trial concerns and fourteenth amendment equal protection concerns under the analogous provisions of their respective state constitutions, courts in California, Massachusetts, and Florida have prohibited both parties from excluding jurors on the ground of race. *Wheeler*, 22 Cal.3d at 283 n. 29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 907 n.29; *Soares*, 377 Mass. at 490 n.35, 387 N.E.2d at 517 n.35; *State v. Neil*, 457 So.2d 481 (Fla. 1984); see discussion in Point III.

12 Distinguished commentators as well as the courts have observed the significant educational role which trial by jury plays in the American polity. *See, e.g.*, De Tocqueville, *Democracy in America*, Vol. I, ch. XVI at 291-98 (Vintage 1954) ("The jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it to rule well."); *see also* Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 5 n.13, 5-7 (1966).

may be told that, because of race, he or she is unqualified to exercise the civic duty to try cases impartially. Such an exclusion is precisely the kind of classification forbidden by the fourteenth amendment's guarantee of equal protection of the law. "[F]or racial discrimination to result in the exclusion of otherwise qualified groups not only violates our Constitution . . . but is at war with our basic concepts of a democratic society." *Smith v. Texas*, 311 U.S. 128, 130 (1940).

In *Carter*, this Court reaffirmed its adherence to one of the earliest, landmark equal protection cases, *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880), noting that "[t]he exclusion of Negroes from jury service is 'practically a brand upon them . . . , an assertion of their inferiority. . . .' " 396 U.S. at 329. The *Strauder* court had reasoned that racial exclusion denies a class of potential jurors the "privilege of participating equally . . . in the administration of justice" and stigmatizes the members of the public excluded by declaring them unfit for jury service. *Id.* at 308.

Citizens are equally stigmatized as unfit to serve whether they are excluded from jury service on the basis of race by statute, *e.g.*, *Strauder*, by commissioners who summon the *voir dire*, *e.g.*, *Norris v. Alabama*, 294 U.S. 587 (1935), or by the lawyers who finally select the jury. The equal protection clause protects each citizen against race discrimination at every stage of the jury selection process.

It is plain that potential jurors perceive racial exclusion from jury service as stigmatizing. In a case in Kings County, New York, where a Hispanic defendant was charged with killing a black victim, the defense counsel systematically struck all black potential jurors. One excluded black juror sent a letter to the District Attorney complaining bitterly of the exclusion and seeking some way to purge the court system of this kind of discrimination.[13]

The Constitution abhors the reduction of an individual to a racial stereotype, and demands, in the name of impartiality and legitimacy, a jury selection system that preserves the possibility of a representative cross-section on each jury. This

---

13 The text of the letter is attached as an appendix.

Court should not countenance the distortion of its standards for a fair trial, or immunize jury selection from the demands of the equal protection clause, by permitting the abuse of the peremptory challenge to strike jurors on the basis of race.

POINT II

THE SAFEGUARDS SET FORTH IN *SWAIN* FOR DETECTING AND RECTIFYING UNLAWFUL DISCRIMINATION IN THE USE OF THE PEREMPTORY CHALLENGE HAVE PROVEN INEFFECTIVE AND UNWORKABLE. BY CONTRAST, THE *WHEELER* PROCEDURE EFFECTIVELY PRESERVES THE PEREMPTORY CHALLENGE AS A MEANS OF STRIKING BIASED JURORS WHILE PREVENTING THEIR UNCONSTITUTIONAL USE TO ELIMINATE PEOPLE SOLELY BECAUSE OF RACE.

A concern for the orderly administration of justice provides no reason to permit the racially discriminatory use of peremptory challenges. It does, however, make desirable the creation of procedures to avoid unduly burdensome inquiry while eliminating demonstrated abuses. In *Swain*, this Court sought to satisfy both of these goals by creating a procedure which requires a defendant alleging unlawful use of the peremptory challenge in a particular case to establish that the prosecutor was engaging in a systematic pattern of discrimination in "case after case." 380 U.S at 223-24. The experience of the lower state and federal courts under this rule shows that it has encouraged discrimination rather than controlled it, see discussion at 7-9, and that the burden of meeting the *Swain* test is nearly insurmountable. *See* authorities collected in *McCray v. New York*, 461 U.S. 961, 965-66, (Marshall, J., dissenting from denial of *certiorari*).

Nevertheless, some people are opposed to overruling the irrebuttable presumption of *Swain*, contending that it would create unduly burdensome procedural problems during the course of criminal trials, and would irreparably dismantle the

peremptory challenge system. *See, e.g., Swain*, 380 U.S. at 221-22; *People v. Davis*, 95 Ill.2d 1, 447 N.E.2d 353, *cert. denied*, 104 S. Ct. 507 (1983); *People v. McCray*, 57 N.Y.2d at 547-49, 457 N.Y.S.2d at 443-45; Saltzburg & Powers, 41 Md. L. Rev. 337; Younger, 21 Judges' J. at 55-56. Neither of these arguments is correct.

Since *Swain*, several state courts, and two federal circuits, have adopted more workable and fairer approaches to the problem of discrimination in the last stage of jury selection. *See McCray*, 750 F.2d 1113 (2d Cir. 1984); *United States v. Leslie*, 759 F.2d 366 (5th Cir. 1985), *reh'g en banc granted*, No. 83-3719 (May 14, 1985); *People v. Wheeler*, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979); *State v. Crespin*, 94 N.M. 486, 612 F.2d 716 (Ct. App. 1980); *State v. Neil*, 457 So.2d 481 (Fla. 1984); *New Jersey v. Gilmore*, No. A-870-82T4 (Super. Ct. Mar. 8, 1985); *People v. Thompson*, 79 A.D.2d 87, 435 N.Y.S.2d 739 (2d Dep't. 1981), *overruled*, *People v. McCray*, 57 N.Y.2d 542, 457 N.Y.S.2d 441 (1982), *cert. denied*, 461 U.S. 961 (1983).[14] The experience of these jurisdictions shows that judicial evaluation of the reasons for suspect peremptory challenges can be accomplished through workable procedures which do not impose a substantial burden on the orderly administration of justice.

Under the rule first adopted by the California courts in *Wheeler*, and substantially followed by other jurisdictions which ban discrimination in jury selection, a party who believes his opponent is using peremptory challenges to strike jurors on the basis of race is required to raise the point in a

---

14 The *McCray* court relied on the sixth amendment for its ban on discriminatory jury selection. In *Wheeler*, *Soares*, *Crespin*, *Neil*, *Thompson*, and *Gilmore*, the courts all rested their decisions on their respective state constitutions. In *Leslie*, the court exercised its supervisory powers in addressing the issue. The Eighth Circuit has also encouraged its trial courts to use their supervisory powers to prevent the abuse of peremptory challenges to exclude jurors because of race. *Childress*, 715 F.2d at 1321; *see also United States v. Jackson*, 696 F.2d 578 (8th Cir. 1982), *cert. denied*, 460 U.S. 1073 (1983).

timely fashion, make a complete record to support the claim, and make a *prima facie* case of such discrimination to the satisfaction of the trial court. That court should begin with a strong presumption that the party exercising a peremptory challenge is doing so on a constitutionally permissible ground. This presumption gives deference to the legislative decision to permit and encourage such challenges, and gives respect to counsel as officers of the court.

In considering whether there is a *prima facie* case of discrimination, a court might find persuasive some or all of the following: counsel has eliminated or nearly eliminated members of one race from the venire; counsel has used a disproportionate number of peremptory challenges against members of one race; counsel has struck jurors that have in common only their race and nothing else; counsel has asked no questions of challenged jurors on *voir dire* and has obtained no information, other than appearance, on which to base a challenge; the defendant and the victim are of different races, and counsel appears to be excluding members of the opponent's race.

The primary responsibility for evaluating this evidence should rest with the trial court. The trial court should consider the evidence in light of its observations of counsel in the particular case, and its general knowledge of local conditions and local counsel. The trial court may find no *prima facie* case, and reject the claim of discrimination.

In the alternative, if the court finds a *prima facie* case, that does not end the matter. At that point, the burden of coming forward with evidence shifts, although not the ultimate burden of persuasion. Opposing counsel may be asked to explain his or her peremptory challenges, giving reasons that rebut the *prima facie* case of discrimination. The reasons need not justify a challenge for cause, but need only be plausible reasons, sufficient to satisfy the court that no discrimination was present. The trial court, of course, has the responsibility of assessing the genuineness of the proffered explanations, and should reject those which are clearly pretextual.

The ultimate burden of proof remains on the litigant who claims discrimination. If that party proves the claim, and

opposing counsel fails to justify the challenges to the satisfaction of the court, then all jurors must be dismissed, the venire must be quashed, and the jury selection must begin anew. This procedure follows the thoughtful analysis of this Court in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The *Wheeler* approach has proven an effective and efficient ban on discrimination. "Since the *Wheeler* decision, complaints about the racial composition of trial juries have been virtually eliminated in California." Letter from Justice Stanley Mosk, Sup. Ct. of Calif. to New York *Times*, A24, col. 3 (June 24, 1983). Moreover, the rule has posed no practical problems whatsoever. *See, e.g., People v. Hall*, 35 Cal.3d 161, 672 P.2d 854, 197 Cal. Rptr. 71 (1983) (observing that the People had not produced or cited any empirical evidence in support of their criticism of *Wheeler*, and that there is, in fact, a "dearth" of such evidence). The *Hall* court remarked:

> In particular, the assumption underlying some articles critical of *Wheeler* [these sources omitted], and echoed by the People, that restricting the exercise of peremptory challenges to proscribe those prompted by group bias may eliminate the 'hunch challenge' is without demonstrable merit. A prosecutor may act freely on the basis of 'hunches', unless and until these acts create a *prima facie* case of group bias, and even then he may rebut the inference.

35 Cal.3d at 170. Because the *Wheeler* approach requires a genuine *prima facie* showing of discrimination before any judicial inquiry may occur, the rule has not led to the numerous or protracted mid-trial hearings predicted by defenders of *Swain*.

The experience in Massachusetts under *Soares* has been equally positive. In 1984, a federal district court in that state ordered and conducted "an evidentiary hearing [to consider] testimony to be offered on the impact of *Soares* on criminal trial practice." *Simpson v. Commonwealth*, No. 81-1193-S, slip op. at 14 (D. Mass. July 20, 1984). Although the hearing dates were spread over a two-month period, not one state

prosecutor and not a single defense counsel expressed any criticism of the rule.

In Florida, a ban on race discrimination in jury selection has existed since 1984. *State v. Neil*, 457 So.2d 481 (Fla. 1984). There is absolutely no evidence that the rule has imposed any undue burden on attorneys or the courts.

In New York, a similar rule against discriminatory peremptory challenges was the law of the Second Judicial Department for almost two years, as a result of *People v. Thompson*, 79 A.D.2d 87, 435 N.Y.S.2d 739 (2d Dep't 1981), *overruled*, *People v. McCray*, 57 N.Y.2d 542, 457 N.Y.S.2d 441 (1982), *cert. denied*, 461 U.S. 961 (1983). During that period, it created no difficulties, as *amicus* has consistently maintained based on the experience of her office and conversations with other attorneys and judges. *See McCray*, 750 F.2d at 1118.

Under the Second Circuit's version of the rule in *McCray*, 750 F.2d 1113, there has been at least one hearing to consider allegations of improper peremptory challenges. *Roman v. Abrams*, No.-85-Civ. 0673-CLB (S.D.N.Y. May 15, 1985).[15] Despite the dislike for the rule of the particular judge presiding at that trial, reflected in the tone of his opinion, and his failure to require a *prima facie* showing prior to obliging the prosecutor to rebut the challenge, the hearing actually served its purpose with a minimum of difficulty. Having considered the evidence, the court concluded that "the prosecutor used his peremptory challenges deliberately, insofar as possible, to effect the invidious purpose of eliminating or reducing the number of white jurors who would try Roman's case." *Id.*, slip op. at 15. A new trial was ordered, and the perceived injustice rectified.

---

15 *Roman* involved a claim by a white defendant that a prosecutor had used ten of his eleven peremptory challenges to exclude white and other "light-skinned" jurors. Slip op. at 7. An additional peremptory challenge was made against a white juror and then withdrawn when the court asked the prosecutor to explain his reasons. At the hearing, the prosecutor offered reasons for these challenges, but the court rejected them as pretextual because he had failed to strike other jurors of different races who had met the same criteria. *Amicus* takes no position on the accuracy of the court's factual finding, but merely notes that it was accomplished without substantial burden on counsel or the court system.

Once this Court eliminates the ambiguity that has followed in the wake of *Swain*, and makes clear that the Constitution prohibits jury selection based on race, most lawyers will adjust their practices and obey this Court's command. The *Wheeler* rule provides an efficient and effective enforcement mechanism to deal with those who do not. Trial judges are fully capable of distinguishing between bona fide justifications and sham excuses for discriminatory conduct.[16]

California and other jurisdictions have provided a procedural model for curtailing the impermissible use of peremptory challenges. This Court should extend to citizens in the other states the same protection for their constitutional rights.

POINT III

THE BAN ON RACE DISCRIMINATION IN THE EXERCISE OF PEREMPTORY CHALLENGES MUST EXTEND TO DEFENSE COUNSEL AS WELL AS TO PROSECUTORS.

The ban on race discrimination in jury selection must extend to defense counsel as well as to prosecutors if constitutional rights are to be adequately protected. Sixth and fourteenth amendment interests are equally offended regardless of who skews the jury and discriminates against jurors on the basis of race. Such discrimination is pervasive among defense counsel as well as prosecutors. As the California, Massachusetts, and Florida courts have recognized, the prohibition must extend to defense counsel in order to guarantee that potential jurors are not excluded and stigmatized in violation of their rights, and to preserve the impartiality, representativeness, and appearance of

---

16 The Second Circuit has rightly observed that the

> process of identifying discriminatory conduct and pretextual explanations is performed daily in the course of litigation under Title VII of the Civil Rights Act of 1964 and a host of other statutes.

McCray, 750 F.2d at 1132. Moreover, the need for such an evaluation does not even arise unless an aggrieved litigant has made out a *prima facie* case.

fairness in the criminal jury trial system. *Wheeler*, 22 Cal.3d at 283 n.29, 583 P.2d at 765 n.29; *Soares*, 377 Mass. at 490 n.35, 387 N.E.2d at 517 n.35; *Neil*, 457 So.2d 481.

The defendant's rights are not the only ones implicated in the sixth amendment's guarantee of a fair trial. This Court has affirmed the state's interest in prosecutions "tried before the tribunal which the Constitution regards as most likely to produce a fair result." *Singer v. United States*, 380 U.S. 24, 36 (1965); *see also Gannett Co. v. De Pasquale*, 443 U.S. 368, 382-83 (1979) ("independent public interest in the enforcement of Sixth Amendment guarantees"). Thus, the public is equally entitled to a representative jury, fairly drawn from a cross-section of the community unimpaired by a defendant's improper exercise of peremptory challenges.

A one-sided rule would unbalance the jury selection process and undermine the possibility of a cross-section essential to fairness and representativeness. The risk is real and substantial because the practice of striking jurors on the basis of race is widespread among defense counsel as well as prosecutors. *See, e.g., Commonwealth v. Little*, 384 Mass. 262, 424 N.E.2d 504 (1981); *Commonwealth v. Perry*, 15 Mass. App. Ct. 932, 444 N.E.2d 1298, *appeal denied*, 388 Mass. 1105, 448 N.E.2d 766 (1983); *Commonwealth v. DiMatteo*, 12 Mass App. Ct. 547, 427 N.E.2d. 754 (1981), *appeal denied*, 385 Mass. 1101, 440 N.E.2d 1173 (1982).[17] Because the diversity of the community contributes to impartiality, that possibility of a cross-section must be preserved against illicit encroachment by either litigant.

---

17 Prosecutors charged with engaging in the practice frequently respond by pointing to similar behavior by defense counsel. *See, e.g., People v. Fuller*, 136 Cal. App.3d 403, 417, 186 Cal. Rptr. 283, 291 (1982); *Soares*, 377 Mass. at 489 n.35, 389 N.E.2d at 517 n.35; *Commonwealth v. Brown*, 11 Mass App. Ct. 288, 416 N.E.2d 218 (1981). Of course, discrimination by defense counsel does not justify discrimination by the prosecutor. It does, however, demonstrate the need for a rule that prohibits discrimination by both parties.

Moreover, a balanced rule serves to protect minority groups in the community.

> For example, when a white defendant is charged with a crime against a black victim, the black community as a whole has a legitimate interest in [the fair possibility of] participating in the trial proceedings; that interest will be defeated if the prosecutor does not have the power to thwart any defense attempt to strike all blacks from the jury on the ground of group bias alone.

Wheeler, 22 Cal.3d at 282 n.29, 148 Cal. Rptr. at 907 n.29, 583 P.2d at 765 n.29; *Soares*, 377 Mass. at 490 n.35, 387 N.E.2d at 517 n.35. Minorities are particularly vulnerable to race-based exclusion and the unfairness that results. See discussion at 16n.9.

The consequences of permitting unrestrained use of peremptory challenges by defense counsel were demonstrated in Miami in 1980. White police officers were tried on charges that they had beaten to death a black insurance executive. After the defendants exercised their peremptory challenges to remove all blacks from the panel, the all-white jury acquitted the defendants. The verdict touched off rioting in which fourteen people were killed and $200 million was lost in property damage, inventory losses, lost wages, and lost tourist dollars. The Florida governor's report on the disturbance specifically identified the practice of excluding blacks from juries in racially sensitive cases as a cause of the riots and a reason why blacks in Dade County distrust the criminal justice system. *See Andrews v. State*, 438 So.2d 480, 482 n.4 (Fla. Dist. Ct. App. 1983) (Ferguson, J., dissenting), quoting Miami *Times*, June 23, 1983, p. 1, col. 1.

Again, in 1984, violence and outrage followed the acquittal of four Miami police officers acccused of killing black men. In each of the cases, defense lawyers had used their peremptory challenges to strike all blacks from the juries. New York *Times*, Mar. 18, 1984, p. 23, cols. 1, 4. The exclusion of qualified jurors solely on the basis of race outraged the community and undermined the legitimacy of the judicial process. American

society cannot afford the loss of public confidence in the fairness and integrity of this nation's system of justice. *See Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979); *Ballard*, 329 U.S. at 195.

Because impartiality, representativeness, and also the appearance of fairness are essential interests of society as well as the defendant, these sixth amendment interests do not belong to the defendant alone, and the Constitution does not permit the defendant to abandon or defeat them. The Constitution would not permit a defendant to elect to go to trial before a five-person jury, *see Ballew*, or to waive the state's constitutional burden of proving guilt beyond a reasonable doubt, *see In re Winship*, 397 U.S. 358 (1970).[18] Neither does the Constitution leave the important interests of a fair trial solely at the mercy of either party to the judicial proceeding.

Moreover, when defense attorneys exclude jurors on the basis of race, just as when prosecutors do, they violate the rights of those citizens to equal treatment irrespective of race. Such an exclusion improperly denies the challenged, qualified jurors their protected opportunity to participate in a fundamental governmental process. *Carter*, 396 U.S. 320; *Strauder*, 100 U.S. at 308. Furthermore, it stigmatizes them in their own eyes and in those of any observers of the trial, which is, of course, a public event. *Id.*

Thus, under the sixth and fourteenth amendments, a defendant's race-based use of the peremptory challenge violates the rights of both the jurors and the public, even though the discrimination is perpetrated by an ostensibly private actor. A state cannot avoid its obligation to maintain a nondiscriminatory jury selection system by delegating part of the selection process to private parties. A state's jury selection system is the mechanism by which citizens are selected to participate in the

---

18 The existence of a constitutional right does not necessarily create a coextensive power to waive that right. For example, in *Faretta v. California*, 422 U.S. 806 (1975), this Court rejected the notion that a defendant's right to counsel gave him an automatic right to represent himself at trial. Instead, such right had to be "independently found in the structure and history of the constitutional text." *Id.* at 819 n.15.

judicial process. In selecting a jury, defense counsel is performing a governmental function, and therefore counsel is bound by the constitutional constraints by which all state actors must abide.[19]

The state action issue posed here is analogous to that posed in one of the White Primary Cases, *Nixon v. Herndon*, 273 U.S. 536 (1927). In *Herndon*, the Supreme Court held that Alabama could not exclude blacks from voting by delegating to a private political party the task of determining qualifications for primary voters, and permitting that party to bar blacks from the party primary. Similarly, the state may not exclude blacks or any racial groups from jury service by delegating the task of jury selection in part to a private attorney, and permitting that attorney to exclude a class of jurors through discriminatory exercise of the peremptory challenge.

Moreover, defense counsel's challenges would have no effect unless they were enforced by the court, and the Constitution prohibits the courts from enforcing an exclusion of jurors solely on the basis of race. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1 (1948).[20] If a state's peremptory challenge statute were interpreted so as to authorize race discrimination, it would be unconstitutional. The state simply may not maintain a discriminatory jury selection system whether the discrimination is practiced by government officials or private individuals.

Defendants have claimed that the prohibition cannot apply to them because any restriction on their exercise of the peremptory challenge inhibits their ability to obtain an impartial jury

---

19 A contrary conclusion is not required by *Polk County v. Dodson*, 454 U.S. 312 (1981), which held that a public defender does not ordinarily act under color of state law for purposes of suit under 42 U.S.C. § 1983. In fact, *Polk County* recognized that a public defender may act under color of state law for some purposes. 454 U.S. at 324-25.

20 In *Shelley*, the Court held that the judicial enforcement of a racially restrictive real estate covenant violates the fourteenth amendment. Similarly, the Constitution prohibits the courts from serving as defendant's instrument of discrimination on the basis of race.

and fair trial. The state courts have rightly rejected this claim. *See, e.g., Little*, 384 Mass. 262, 424 N.E.2d 504; *Commonwealth v. Reid*, 384 Mass. 247, 424 N.E.2d 495 (1981). While a defendant is entitled to an unbiased jury, a defendant has no constitutional right to peremptory challenges, which are exercised only after biased jurors have been struck for cause. *Rosales-Lopez v. United States*, 451 U.S. 182, 188 n.6 (1981); *Swain*, 380 U.S. at 224. The right to an impartial jury can be protected without granting a defendant the right to remove unbiased jurors solely on the basis of race. *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948); *Stilson v. United States*, 250 U.S. 583, 586 (1919).

Critics of the *Wheeler* rule maintain that because genuine individual bias is difficult to reveal during *voir dire*, defendants cannot obtain an impartial jury without relying on the assumption that certain groups of people characteristically harbor certain biases. *See, e.g., People v. McCray*, 57 N.Y.2d at 547-548, 457 N.Y.S.2d at 443-445. This assertion is no more valid for defendants than for prosecutors, and rests on an invidious fallacy about the correlation between race and individual bias. Because it is unfounded and unfair, this Court should reject it.

Moreover, the claim that individuals can properly be considered and dismissed by class would defeat all antidiscrimination laws. Opponents of such laws frequently say they cannot select employees, or students, or tenants without relying on assumptions about group characteristics. The Constitution and the laws of this nation do not permit that response. As discrimination has been outlawed in various aspects of life, people have learned how to get the specific information about individuals they need in order to make the choices formerly made on the basis of impermissible group affiliations. Encouraging defense counsel and prosecutors to do what the rest of society must is mandated by "the strong policy the Court has consistently recognized of combating racial discrimination in the administration of justice." *Rose*, 443 U.S. at 558.

CONCLUSION

The courts of this country have taken great strides in eliminating race discrimination in education, in employment, in access to public accommodations, and in many other areas. Surely it is time for this Court to rid the judicial system of intentional race discrimination. Trial by jury is the heart of the judicial system, and one of its most important functions is to command the confidence of the community in the justice of its results. Any selection process which permits either party to exclude jurors solely on the basis of race cannot hope to command that confidence. In order to vindicate the constitutional rights of defendants, jurors, and the public, this Court should adopt the procedure urged by *amicus* and should purge the jury selection process of intentional discrimination based on race.

Respectfully submitted,

ELIZABETH HOLTZMAN
District Attorney

BARBARA D. UNDERWOOD
Assistant District Attorney
Counsel of Record

PETER A. WEINSTEIN
EVAN WOLFSON
Assistant District Attorneys

Kings County District Attorney's Office
210 Joralemon Street
Brooklyn, New York 11201
(718) 802-2156
Counsel for Amicus Curiae

June 28, 1985

APPENDIX

APPENDIX

11/21/84

Elizabeth Holtzman
District Attorney
210 Jorelmon Street
Brooklyn, N.Y.

Dear Mrs. Holtzman:

I am not sure that I am writing to the right person, if not possible you will be able to put this bit of information in the right place.

I am writing concerning the New York (Brooklyn) Judicial system. Which has turned out to be one big joke, a waste of time and the tax payers money.

I am a common laborer not professing to know law, but I do have common sense and understanding. I was summon to Supreme Court 11/15/84 to serve as a possible Trial Juror. After walking about for four days, I was finally called and sent to court room 574 part II, 11/21/84. Presiding Judge Leone, defendant Mr. Rosada. There were a least sixty or seventy people sent to room 574 to pick a jury of twelve plus two alternates. The majority of the groups sent were Blacks. Mr. Rosado is being tried for Murder 11/23/84.

After telling us what the law expected of us as possible Jurors, which as the Judge stated was common sense and a promise from each of us to be fair and impartial then the selection began; it made no difference to the Judge the District Attorney or the defendants Lawyer that the majority of the prospective Jurors were Black. They manage to pick thirteen (13) whites and one black *second* alternate making sure of an all white Jury.

We were also reminded that we if selected as a Juror, were not suppose to take Sympathy into the founding of a Verdict. But Mrs. Rosado was in the court room while the selection was being made she is about seven months pregnant. She was seated right a long with the prospective Jurors and if that isn't a sympathy pitch I've never seen one. Some of us do have common sense.

And so I ask you Mrs. Holtzman if we Blacks don't have common sense and don't know how to be fair and impartial, why send these Summons to us? why are we subject to finds of 250.00 if we dont appear and told it's our civic duty if we ask to be excused. Why bother to call us down to these courts and then over look us like a bunch of niave or better yet ignorant children. We could be on our jobs or in schools trying to help our selves instead of in court house Halls being Made fools of.

I will not sign my name because I am a little person and will surely get the short end of the stick. I just thought it was time for some one to Know about the Judicial system and if there is anything that can be done or anyone who wants to do it, the matter will be taken care of. A Copy of this letter will be sent to Eye Witness News.

Thanking You

Office-Supreme Court, U.S.
FILED
NOV 25 1985
ALEXANDER L. STEVAS,

NO. 84-6263

IN THE

Supreme Court of the United States

October Term, 1984

JAMES KIRKLAND BATSON,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

Robert J. Miller
President
National District Attorney
Association, Inc.

Jack E. Yelverton, Esq.
Executive Director
National District Attorneys
Association, Inc.
1033 North Fairfax Street
Suite 200
Alexandria, Virginia 22314

Robert E. Weiss P-22148
Prosecuting Attorney
Genesee County, Michigan

Donald A. Kuebler P-16282
Assistant Prosecuting Attorney
Chief, Appellate Division
Office of the Genesee County
Prosecuting Attorney
For the National District
Attorneys Association, Inc.
100 Court House
Flint, Michigan 48502
(313) 257-3248

THE AMERICAN PRINTING COMPANY
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a black defendant's sixth amendment right to an impartial jury and right to a jury representing a fair cross-section of the community was violated by a state trial court by swearing in an all white jury, over the defendant's objection, after the prosecution exercised four of six peremptory challenges to strike all black veniremen from the panel.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii-v
Interest of Amicus	2
Statement	3
Summary of Argument	4
Argument	
This Court should conclude that the prosecutorial peremptory challenges exercised in this case were proper under the fourteenth amendment equal protection clause and the sixth amendment. This Court should further determine that there is no constitutional need to change or otherwise modify this Court's decision in *Swain v Alabama*.	5-15
Conclusion	16

TABLE OF AUTHORITIES

Cases	Page
Batson v Commonwealth, No. 82-CR-0010	3, 7
Commonwealth v Henderson, 497 PA 23, 438 A 2d 951 (1981)	11, 13
Commonwealth v McFerron, 680 SW 2d 924 (1984)	3
Commonwealth v Soares, 387 NE 2d 499 (1979)	3, 10, 11, 12, 13
Gilliard v Mississippi, ____ U.S. ____, 104 S Ct 40, 78 L Ed 2d 179 (1983)	13
Hayes v State of Missouri, 120 U.S. 68, 70, 7 S Ct 350, 351, 30 L Ed 578 (1887)	14
McDonough Power Equipment v Greenwood, ____ US ____, 78 L Ed 2d 663, 105 S Ct ____ (1984)	10
People v Kagan, 101 Misc. 2d 274, 429 NYS 2d 987 (1979)	10
People v Smith, 622 P 2d 90 (Colo. App. 1980)	11
People v Wheeler, 538 P 2d 748 (1978)	3, 6, 10, 11, 12, 13, 15
Smith v Phillips, 455 US 209, 217, 71 L Ed 2d 78, 102 S Ct 940 (1982)	4
State v Crespin, 94 NM 486, 612 P 2d 716 (N.M. Ct. App. 1980)	10
State v Grady, 286 NW 2d 60 (Wis. Ct. App. 1979)	11
State v Neil, 457 So 2d 481 (1984)	10, 11, 15
State v Wiley, 698 P 2d 1233 (1985)	10
Swain v Alabama, 380 US 202, 85 S Ct 824, 13 L Ed 2d 759 (1965)	3, 5, 6, 7, 9, 11, 12, 13, 16
Taylor v Louisiana, 419 U.S. 522 (1975)	12
United States v Leslie, 759 F 2d 381 (CA 5 1985)	7, 14

TABLE OF AUTHORITIES—(Continued)

Reports and Articles	**Page**
Anno. 79 ALR 3d 14 (1977)	6, 12
Comments, *Is There a Place for the Challenge of Racially-Based Peremptory Challenges*, 3 Det. Coll. of Law Rev 703, Fall '84 at p 704, fn 6.	7, 14
Comment, *The Prosecutor's Exercise of the Peremptory Challenge to Exclude Non-White Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause*, 46 U. Cin. L. Rev. 554 (1977)	7
Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 St. Louis U.L.J. 662 (1974)	7
Comment, *Swain v Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 Va. L.Rev. 1157 (1966)	7
Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 Yale L.J. 1715, (1977)	7
Note, *Peremptory Challenges and the Meaning of Jury Representation*, 80 Yale L.J. 1177 (1980)	12
Note, *The Jury: A Reflection of the Prejudice of the Community*, 20 Hastings L.J. 1417 (1969)	7
Note, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 Miss L.J. 157 (1967)	7
Note, *The Supreme Court, 1964 Term*, 79 Harv. L.Rev. 103, 135-39 (1964)	7
Note, *Fair Jury Selection Procedures*, 75 Yale L.J. 322 (1965)	7
Note, *Recent Developments, Racial Determination in Jury Selection*, 41 Alb.L.Rev. 623 (1977)	7

TABLE OF AUTHORITIES—(Concluded)

Reports and Articles **Page**

Note, *Criminal Procedure Law*, 55 St. John's Law Rev 789 (1981) 11

Silverman, *Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law*, University of Pittsburgh Law Review, Vol 44: 673 14

Saltzburg and Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md. L.R. 337, 345 (1982) 8, 11

NO. 84-6263

IN THE

Supreme Court of the United States

October Term, 1984

JAMES KIRKLAND BATSON,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

This brief is filed in accordance with Rule 36 of the Supreme Court Rules. Letters of consent to file a brief *amicus curiae* by the National District Attorneys Association have been obtained from David L. Armstrong, Attorney General of the Commonwealth of Kentucky, counsel for the Respondent, and J. David Niehaus, Deputy Appellate Defender of the Louisville-Jefferson County Public Defender Corporation, counsel for the Petitioner, and they have been filed with the United States Supreme Court Clerk.

INTEREST OF AMICUS

The National District Attorneys Association, Inc., is a non-profit corporation and the only national organization representing state and local prosecuting attorneys in the United States. Its publications, training and educational programs and *amicus curiae* activities and pursuits have as their objective reforms of the criminal justice system for the benefit of all our citizens, the defense bar and prosecutors, and the trial courts of the several jurisdictions.

The Association and its membership are cognizant of recent developments in several state and federal appellate court decisions regarding the constitutional propriety of the prosecutorial exercise of peremptory challenges which results in the exclusion from a particular case of all members of a defendant's race.

The issue upon which certiorari was apparently granted in the case *sub judice*, i.e.,

> Whether a black defendant's sixth amendment right to an impartial jury and right to a jury representing a fair cross-section of the community was violated by a state trial court by swearing in an all white jury, over the defendant's objection, after the prosecution exercised four of six peremptory challenges to strike all black veniremen from the panel,

is of particular concern to the National District Attorneys Association. The interest of the Association is predicated on the substantial and far-reaching effect that any decision will have on the jury selection process in the several jurisdictions. The National District Attorneys Association is also concerned that this Court, if it is inclined to change or modify prior decisions of this Court regarding the exercise of peremptory challenges, should endeavor to apply such changes equally to both parties to criminal trial proceedings.

STATEMENT

In its unpublished memorandum opinion of December 20, 1984, *Batson v Commonwealth*, No. 82-CR-0010 at pp. 4, 5 thereof, the Kentucky Supreme Court refused to join the decision in the states of California (*People v Wheeler*, 538 P 2d 748 (1978)) and Massachusetts (*Commonwealth v Soares*, 387 NE 2d 499 (1979)) which essentially stand for the proposition under their respective states' constitutions that peremptory challenges against minority groups are unconstitutional where there is a demonstrated pattern of challenges against jurors from a discrete group and there is a likelihood that the prosecutorial challenges were based solely on group membership. The Court, rather, affirmed the petitioner's conviction under authority of another Kentucky case, *Commonwealth v McFerron*, 680 SW 2d 924 (1984), relying on this Court's decision in *Swain v Alabama*, 380 US 202, 85 S Ct 824, 13 L Ed 2d 759 (1965) as authority for the proposition that a mere allegation of the lack of a fair cross-sectional jury which does not concern a systematic exclusion from the jury drum does not rise to constitutional proportions. (*Batson* slip op. at p. 5)

The National District Attorneys Association is in accord with the arguments advanced by the Attorney General of the Commonwealth of Kentucky in urging that this Honorable Court deny the petitioner's request for reversal of petitioner Batson's state court convictions for second degree burglary and receiving stolen property over $100.00.

The National District Attorneys Association additionally urges that this Court reaffirm its longstanding decision in *Swain v Alabama*, *supra*, finding it fully applicable to the case *sub judice*. *Amicus* further urges that in the event there is to be any modification of *Swain*, for the reasons more fully set forth in the argument portion of this brief any guideposts for jury selection and the exercise of peremptory challenges apply equally to the prosecution and the defendant.

SUMMARY OF ARGUMENT

Prosecutorial peremptory juror challenge to remove from a petit jury all members of a defendant's race is not violative of a defendant's right to be tried by an impartial jury drawn from a fair cross-section of the community under the sixth amendment of the United States Constitution. While peremptory challenges are generally the creation of a legislature and not constitutionally required, the ability to exercise them by trial counsel is one of the most significant rights available to the parties of a lawsuit. Permitting judicial inquiry into the reasons for such challenge is inconsistent with the peremptory challenge aspect of juror selection under historic and contemporary trial practice in America. Since the question of the propriety of peremptory challenges of prospective jurors is an issue of major significance to criminal defendants and the prosecution, *amicus* maintains that their use should be continued and should not be interferred with by a trial court. In the event that this Honorable Court decides to permit judicial inquiry into the reasons for exercising peremptory challenges, *amicus* would ask that any rules that might be developed in this regard be made applicable to counsel for all parties.

ARGUMENT

This Court should conclude that the prosecutorial peremptory challenges exercised in this case were proper under the fourteenth amendment equal protection clause and the sixth amendment. This Court should further determine that there is no constitutional need to change or otherwise modify this Court's decision in *Swain v Alabama*.

That the courts of the several states and the United States have been vexed by a rash of appeals and post-conviction petitions concerning the constitutional propriety of the prosecutorial exercise of peremptory challenges to remove certain jurors from the trial of a criminal defendant, needs no elaboration. That there are differences of opinion with respect to the resolution of such claims existing at every level of the judicial system is equally apparent. Notwithstanding several years of debate, dozens of individual cases and the demand for appellate court relief from jury-based convictions where prosecutors have caused to be removed from jury panels by way of peremptory challenge, members of a particular defendant's race, religion, etc., this Court, until the granting of certiorari in the case *sub judice*, has consistently declined to review the issue that this case now presents for resolution.

Petitioner Batson, a black defendant, claims that his sixth amendment right to an impartial jury and right to a jury representing a fair cross-section of the community was violated by the Kentucky trial court by swearing in an all white jury, over his objection, after the prosecutor exercised four of his six peremptory challenges to strike all black veniremen from the panel.

This Court has recently said that one touchstone of a fair trial is an impartial trier of fact. More specifically, "a jury capable and willing to decide the case solely on the evidence before it." *Smith v Phillips*, 455 US 209, 217, 71 L Ed 2d 78, 102 S Ct 940 (1982).

Some 20 years ago in *Swain v Alabama*, 380 US 202, 85 S Ct 824, 13 L Ed 2d 759 (1965), this Court reviewed an issue which is very similar to that raised by petitioner Batson in this case. In *Swain* the Court ruled that to prove a violation of the fourteenth amendment equal protection clause the defendant was required to show that black jurors had been systematically excluded from juries over a long time span. The Court, however, refused to require that a trial court examine the prosecutor's reasons for the exercise of peremptory challenges in any given case. (380 US at 222, 85 S Ct at 837, 13 L Ed 2d at p. 773.) Moreover, permitting such inquiry would be at odds with the purpose of the peremptory challenge, which has as its purpose to permit the respective parties to remove venireman "without a reason stated, without inquiry and without being subject to the court's control." (380 US at 222, 85 S Ct at 836, 13 L Ed 2d at p. 772)

Petitioner Batson makes no persuasive argument here concerning systematic exclusion of blacks from jury panels in Kentucky. His claim is that it was improper for the Kentucky prosecutor to exercise four of his six peremptory challenges, and that the trial court was in error in not requiring the prosecutor to explain his reasons for peremptorily excusing such jurors, thus leaving the defendant to be tried by an all white jury. Batson essentially argues that the *Swain* decision does not reasonably or effectively address his sixth amendment right to be tried by a jury representing a fair cross-section of the community.

Petitioner Batson also argues that in order to properly resolve his claim, this Court should adopt an approach similar to that set forth in California, *People v Wheeler*, 22 Cal 3d 258, 148 Cal Rptr 890, 583 P 2d 748 (1978).

Prior to the *Wheeler* decision, the courts of the several states unanimously followed this Court's decision in *Swain*. See generally Anno. 79 ALR 3d 14 (1977). While the *Swain* decision has been the subject of criticism as not being

responsive to the issue that cases such as the case *sub judice* present for review, it is submitted that this Court should conclude otherwise. See, e.g., Comments, *Is There a Place for the Challenge of Racially-Based Peremptory Challenges*, 3 Detroit College of Law Rev. 703, Fall '84, p 704 fn 6 citing Comment, *The Prosecutor's Exercise of the Peremptory Challenge to Exclude Non-White Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause*, 46 U. Cin. L. Rev. 554 (1977); Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 St. Louis U.L.J. 662 (1974); Comment, *Swain v Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 Va. L. Rev. 1157 (1966); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 Yale L.J. 1715 (1977); Note, *The Jury: A Reflection of the Prejudice of the Community*, 20 Hastings L.J. 1417 (1969); Note, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 Miss L.J. 157 (1967); Note, *Fair Jury Selection Procedures*, 75 Yale L.J. 322 (1965); Recent Developments, *Racial Discrimination in Jury Selection*, 41 Alb. L. Rev. 623 (1977); Note, *The Supreme Court, 1964 Term*, 79 Harv. L. Rev. 103, 135-39 (1964).

The dissenting opinion of Judge Garwood in *United States v Leslie*, 759 F 2d 381 (CA 5 1985), presents a fresh scholarly analysis of *Swain v Alabama* and sets forth a respectable rationale for retaining *Swain* in its present form.

Judge Garwood correctly points out that *Swain* distinguished between and dealt separately with two types of juror challenges:

> . . . first, those made for the purpose of the particular case being tried . . .; second, those made "for reasons wholly unrelated to the outcome of the particular case on trial . . . to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population." (759 F 2d at p 381)

Judge Garwood then points out:

> . . . The distinction between the two categories of racially based peremptory challenges is likewise reflected in the description of the second type as being the kind the prosecution would make "whatever the circumstances, whatever the crime and whoever the defendant or the victim may be." id. at 837. In Swain part II, the Court held that racially based peremptory challenges of the first kind were a proper and a traditional part of the jury system as known to the common law and American jurisprudence. In its part III, the Swain Court strongly intimated that racially based peremptory challenges of the second kind were improper, but did not expressly rule that they were since it held that no sufficient showing had been made that the challenges in question were of that kind. (759 F 2d at pp. 383, 384)

In this case of *Batson*, the record shows that there were four black jurors on the panel and that the State prosecutor exercised his peremptory strikes to exclude them from the jury. The trial Court found that the State exercise of its peremptory strikes was proper. The prosecutor during the colloquy with defense counsel and the Court indicated that he had done so in this "particular case". (Petitioner's brief at p. 3) It thus appears that the prosecutorial peremptory strikes were of the first type which are proper and a traditional part of American jurisprudence. Judge Garwood also specifically points out that his view and understanding of *Swain* is supported by the scholarly commentary of Saltzburg and Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md. L. R. 337, 345 (1982) where it is said:

> The Swain Court thus recognized two possible motives for exercising challenges against black jurors. The first—the use of race as a proxy by which to identify probable prejudice in a particular case—was explicitly approved by all justices, except Justice Black

who concurred in the result without opinion. The Court emphasized the importance of protecting the inviolability of the peremptory strike, concluding that a court should not scrutinize a prosecutor's motive for challenging blacks in a particular case. The second—the use of challenges to keep blacks off juries—was not approved. (759 F 2d at p 384 fn 5)

Amicus submits the use of peremptory strikes on the grounds of racial or other group-related characteristics, as opposed to individual characteristics should be retained. The jurisprudential significance of the peremptory is well stated in *Swain:*

> It (the peremptory challenge) is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. It is well known that these factors are widely explored during the *voir dire*, by both prosecutor and accused . . . . This Court has held that the fairness of trial by jury requires no less . . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.
>
> . . . In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto*, would no longer be peremptory.

> . . . The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Id. at 836-37 (footnotes omitted)

As recently as 1984 this court in *McDonough Power Equipment v Greenwood*, _____ US _____, 78 L Ed 2d 663, 104 S Ct _____ (1984), although not a sixth amendment case, said:

> . . . Voir dire examination serves to protect the right (of a fair trial) by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in responses to questions on voir dire may result in a juror being excused for cause, hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges . . . . (78 L Ed 2d at p 670)

Recent state appellate court decisions restricting the use of peremptory challenges have been mostly based on state law. *People v Wheeler*, 22 Cal 3d 258, 148 Cal Rptr 890, 583 P 2d 748 (1978); *Commonwealth v Soares*, 377 Mass 461, 387 NE 2d 499, cert denied, 444 US 881, 100 S Ct 170, 62 L Ed 2d 110 (1979); *People v Kagan*, 101 Misc. 2d 274, 429 NYS 2d 987 (1979); *State v Neil*, 457 So 2d 481, 486 (1984); *State v Crespin*, 94 NM 486, 612 P 2d 716, 718 (N.M. Ct. App. (1980)).

The Arizona Supreme Court decision in *State v Wiley*, 698 P 2d 1244 (1985), represents one of the most recent cases to reject a sixth amendment challenge to the State prosecutor's peremptory strikes to eliminate black veniremen from a criminal jury. The Court also rejected the defendant's invitation to adopt the procedures employed in

California *(Wheeler)*, Florida *(Neil)* and Massachusetts *(Soares)*, to restrict the use of peremptory challenges. The Court points out that the *Wheeler* case and its following have not been immune from attack, citing Saltzburg and Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md L Rev 337 (1983); Note Criminal Procedure Law, 55 St. John's L Rev 789 (1981) and *People v Smith*, 622 P 2d 90 (Colo. App. 1980) and *Commonwelath v Henderson*, 497 Pa 23, 438 A 2d 951 (1981).

A significant critical analysis of the impact of *Wheeler* and *Soares* on the criminal law is set forth in the Saltzburg and Powers article where they say:

> These decisions differ from *Swain* in several important respects. First, they assume that the peremptory challenge is intended to be used only to eliminiate specific bias from the jury. This assumption signals a significant departure from the traditional understanding of the challenge as one exercised for any reason or for no reason. Second, they assume that a jury from which some ranges of presumed bias have been excluded is no longer impartial, while *Swain* assumed that permitting unrestricted peremptory challenges furthered impartiality. Third, they presume that the peremptory challenge can be subject to judicial control without compromising its essential purpose — a proposition that *Swain* has rejected. (Saltzburg and Powers, *supra*, note 24, at p 353)

In Wisconsin, the Court in *State v Grady*, 286 NW 2d 60 (Wis. Ct. App 1979) rejected the *Wheeler* approach:

> We refuse to adopt Wheeler on the ground that the test proposed by the California court is vague and uncertain, and severely limits the scope of peremptory challenges. If peremptory strikes can only be exercised in a certain way, dependent on circumstances, and subject to judicial scrutiny, they will no longer be peremptory. We

refuse to undertake such an alteration of the very nature of the peremptory system.

Although *Swain* has been criticized by several jurists and legal scholars, it still remains the most widely accepted authoritative decision on the issue this case presents for reconsideration in this Court. See Anno. 79 ALR 3d 14 (1977)

While *Taylor v Louisiana*, 419 U.S. 522, 530 (1975), is authority for the proposition that a fair cross-section of the community must be represented on a jury venire, it is submitted that the fair cross-section requirement is not as broad as some would urge. Justice White quite properly qualified this requirement where he said:

> . . . (i)t should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition. . . . (id at p 538 and citations)

It has also been stated that the *Wheeler* and *Soares* cases, while decided on state constitutional grounds, were both wrongly decided because the authors of those respective decisions failed to properly interpret this Court's decision in *Taylor v Louisiana*. In Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 Yale L.J. 1177 (1980), the commentator says:

> . . . the principal of jury representation should be understood to mean that certain characteristics of society that profoundly affect a jury's verdict should not be distorted in the jury selection process. The crucial aspect of the community that must be represented is not the subgroup proportion, but the community's mean verdict impact — the mean tendency of its members to influence a verdict toward conviction or acquittal.

While no one will gainsay that the peremptory challenge issue has generated considerable appellate court consternation and substantial scholarly debate since this Court's denial of certiorari in several recent cases, see, e.g., *Gilliard v Mississippi*, _____ U.S. _____, 104 S Ct 40, 78 L Ed 2d 179 (1983), *amicus* respectfully submits that the best juridical thought and better legal commentaries are persuasive that the *Swain* decision should remain the controlling law with respect to complaints of this nature.

Although petitioner Batson complains of the impossible burden imposed by *Swain* and urges that the *Wheeler* approach be adopted by this Court, the National District Attorneys Association maintains that this Court should reject the petitioner's complaint of the *Swain* burden as well as his urging of the adoption of the *Wheeler-Soares* undercutting of the peremptory challenge system.

Mr. Justice Flaherty of the Pennsylvania Supreme Court, in *Commonwealth v Henderson, supra*, sets forth cogent reasons for rejecting the *Wheeler-Soares* approach:

> We emphatically assert that this Court does not subscribe to any theory concerning the likelihood that one racial group will be biased against another in litigation involving members of both groups. In fact, we strongly suspect that all such theories are no more than mere speculation. But what this Court believes about the viability of theories of racial bias is irrelevant to an analysis of the problem of the proper use of peremptory challenges. (438 A 2d at p 954)

Justice Flaherty upon close scrutiny of both *Wheeler* and *Soares* expressed the Court's reason for not including them in the jurisprudence of his state:

> . . . we decline to follow the approach taken by California and Massachusetts because the protections they have devised against abuse of the exercise of peremptory challenges are illusory.

The Court further found that the judicially outlined procedures in those cases are for all practical purposes "unworkable". (438 A 2d at pp 955, 956). See also, Comments, *Is There a Place for the Challenge of Racially-Based Peremptory Challenges?*, Detroit College of Law Rev. 703, Fall, '84.

While the debate continues, and will undoubtedly continue long past decision in this case, *amicus* submits that this Court, on balance, should not be persuaded to change a historically sound criminal trial mechanism that has so well served our judicial system.

There has been some suggestion that the abuse of the peremptory challenge can be remedied by eliminating peremptories by the prosecution and retaining them for the defense. Silverman, *Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law*, University of Pittsburgh Law Review, Vol 44:673. While it is said that the prosecution has no sixth amendment right to a fair trial (p 700) *amicus* submits that such an approach is totally unacceptable in American criminal law jurisprudence. Although the prosecution has no sixth amendment right to a fair trial, the State most assuredly is as entitled to the exercise of peremptories as a criminal defendant. This court should thus not forget the *Hayes v State of Missouri*, 120 U.S. 68, 70, 7 S Ct 350, 351, 30 L Ed 578 (1887) statement on the subject:

> The view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'

Moreover, those jurisdictions that have litigated the matter and have prohibited the State from specifically challenging a juror on the basis of cognizable group affiliation have also held that defendants must also be similarly prohibited. Judge Garwood, in the *Leslie* case, *supra*, at p 402, after

citing the *Wheeler* case, 583 P 2d at p 765, fn 29 summarizes the pertinent decisions as follows:

> . . . "(T)he People no less than individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section. . . . (W)hen a white defendant is charged with a crime against a black victim, the black community as a whole has a legitimate interest in participating. . . . (T)hat interest will be defeated if the prosecutor does not have the power to thwart any defense attempt to strike all blacks. . . ."; *Soares*, 387 N.E. 2d at 517 n. 35 (same; also stating that prohibition would, if properly raised, apply in that case to the "attempt of the defendants . . . to strike all veniremen of Italian descent"); *Commonwealth v DiMatteo*, 12 Mass. App. 547, 427 N.E.2d 754 (1982) (white defendant's attempted peremptory challenge of sole black on venire properly rejected where trial judge was not convinced by defense counsel's questionable nonracial explanation; the crime was apparently not interracial, but the prosecutor was black; *State v Neil*, 457 So. 2d at 487 ((B)oth the state and the defense may challenge the allegedly improper use of peremptories. The state, no less than a defendant, is entitled to an impartial jury" (footnote omitted).) *See also United States v Clark*, 737 F 2d 679, 682 (7th Cir. 1984) ("It would be hard to argue that only a defendant should be allowed to challenge racially motivated peremptory challenges. . . . (T)he prosecutor would be allowed to object to the defendant's making racial peremptory challenges if the defendant could object to the prosecutor's doing so.")

In view of the above-cited persuasive authorities *amicus* submits that in the event this Court renders any decision changing or modifying the exercise of peremptory challenges, this Court should apply those changes equally to the defense and the prosecution.

CONCLUSION

Amicus maintains the *Swain* rule should not be changed by any decision reached by this Court. This case presents the opportunity after several years of debate and judicial decisions to reaffirm without exception the unquestioned use of the peremptory challenge in criminal trials. Accordingly, the National District Attorneys Association respectfully requests that this Honorable Court will affirm the decision of the Supreme Court of the *Commonwealth* of *Kentucky* and thus uphold the convictions of petitioner Batson.

Respectfully submitted,

Robert J. Miller
President
National District Attorneys Association, Inc.

Jack E. Yelverton, Esq.
Executive Director
National District Attorneys Association, Inc.
1033 North Fairfax Street
Suite 200
Alexandria, Virginia 22314

/s/ Robert E. Weiss P-22148
Prosecuting Attorney
Genesee County, Michigan

/s/ Donald A. Kuebler P-16282
Assistant Prosecuting Attorney
Chief, Appellate Division
Office of the Genesee County Prosecuting Attorney
For the National District Attorneys Association, Inc.
100 Court House
Flint, Michigan 48502
(313) 257-3248

DATED: July 24, 1985

(9)

No. 84-6263

Supreme Court, U.S.
FILED
AUG 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAMES KIRKLAND BATSON, PETITIONER

v.

COMMONWEALTH OF KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

CHARLES FRIED
Acting Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

SIDNEY M. GLAZER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

37 pp

QUESTION PRESENTED

Whether judicial supervision of the prosecution's peremptory challenges is constitutionally required where a defendant's claim of racially-based exclusion is predicated only on the exercise of peremptory challenges in his own case.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	4
Argument:	
Petitioner did not establish that he was deprived of a properly constituted petit jury or denied equal protection of the laws	7
A. Under *Swain* v. *Alabama* a defendant cannot establish an equal protection violation by showing only that black veniremen were subjected to peremptory challenge by the prosecution in his case	7
B. A prosecutor's consideration of the group identity of veniremen in exercising peremptory challenges, in the manner permitted by *Swain*, does not violate the Sixth Amendment fair cross-section principle recognized by this Court	12
C. Other criticisms of *Swain* are unpersuasive	25
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Aldridge v. *United States*, 283 U.S. 308	27
Apodaca v. *Oregon*, 406 U.S. 404	19
Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252	26
Belino v. *State*, 465 So. 2d 1043	15
Castaneda v. *Partida*, 430 U.S. 482	25, 26
Commonwealth v. *Henderson*, 497 Pa. 23, 438 A.2d 951	15
Commonwealth v. *Reid*, 424 N.E.2d 495	17
Commonwealth v. *Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881	4, 15

Cases—Continued: Page

Duncan v. *Louisiana*, 391 U.S. 145 4
Duren v. *Missouri*, 439 U.S. 357 .....5, 13, 14, 17, 18, 19
Grigsby v. *Mabry*, 758 F.2d 226 14
Ham v. *South Carolina*, 409 U.S. 524 27
King v. *Nassau County*, 581 F. Supp. 493 30
Lewis v. *United States*, 146 U.S. 370 9
McCray v. *Abrams*, 750 F.2d 1113, petition for cert. pending, No. 84-1426 .....15, 16, 17, 23, 27, 29
McCray v. *New York*, 461 U.S. 961 ..... 23, 25
Nevius v. *State*, 699 P.2d 1053 15
Patton v. *Yount*, No. 83-95 (June 26, 1984)..... 22
People v. *Hall*, 35 Cal. 3d 161, 672 P.2d 854, 197 Cal. Rptr. 71 16
People v. *McCray*, 57 N.Y. 2d 542, 443 N.E.2d 915, cert. denied, 461 U.S. 960 15
People v. *Payne*, 99 Ill. 2d 135, 457 N.E.2d 1202, cert. denied, No. 84-5330 (Nov. 13, 1984) 26
People v. *Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 .....4, 15, 16, 17
People v. *Williams*, 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rtpr. 317 17
People v. *Williams*, 97 Ill. 2d 252, 454 N.E.2d 220, cert. denied, No. 83-5785 (May 14, 1984)..... 15, 26
Pointer v. *United States*, 151 U.S. 396 ..... 9, 29
Rosales-Lopez v. *United States*, 451 U.S. 182..... 27
Smith v. *Texas*, 311 U.S. 128 ..... 21, 22
State v. *Crespin*, 94 N.M. 486, 612 P.2d 716..... 15
State v. *Gilmore*, 199 N.J. Super. 389, 489 A.2d 1175 15
State v. *Grady*, 93 Wis. 2d 1, 286 N.W.2d 607 15
State v. *Neil*, 457 So. 2d 481 ..... 15, 17
State v. *Wiley*, 698 P.2d 1244 15
Strauder v. *West Virginia*, 100 U.S. 303 28
Swain v. *Alabama*, 380 U.S. 202 .....*passim*
Tayor v. *Louisiana*, 419 U.S. 522 .....*passim*
Thiel v. *Southern Pacific Co.*, 328 U.S. 217 18
United States v. *Canel*, 708 F.2d 894, cert. denied, 464 U.S. 852 14
United States v. *Carter*, 529 F.2d 844, cert. denied, 425 U.S. 961 26

Cases—Continued: Page

United States v. *Childress*, 715 F.2d 1313, cert. denied, No. 83-5659 (Jan. 9, 1984) 14
United States v. *Clark*, 737 F.2d 679 14
United States v. *Jenkins*, 701 F.2d 850 14
United States v. *Leslie*, 759 F.2d 366 ..... 15, 23, 28
United States v. *Newman*, 549 F.2d 240 26
United States v. *Thompson*, 730 F.2d 82, cert. denied, No. 83-6809 (Nov. 13, 1984) 14
United States v. *Whitfield*, 715 F.2d 145 14
United States ex rel. Palmer v. *DeRobertis*, 738 F.2d 168 14
Washington v. *Davis*, 426 U.S. 229 26
Weathersby v. *Morris*, 708 F.2d 1493, cert. denied, 464 U.S. 1046 14
Williams v. *Florida*, 399 U.S. 78 ..... 5, 19
Willis v. *Zant*, 720 F.2d 1212, cert. denied, No. 83-1558 (June 18, 1984) 14

Constitution, statutes, rules:

U.S. Const.:
Amend. VI ..... *passim*
Amend. XIV 3, 12, 20
Equal Protection Clause 7
Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* 12, 20
28 U.S.C. 1861 20
28 U.S.C. 1868 27
18 U.S.C. 243 1
Ky. Rev. Stat. (1985):
§ 511.030 2
§ 514.110 2
Fed. R. Crim. P.:
Rule 24(b) 1
Rule 24(c) 1
Ky. R. Crim. P.:
Rule 9.36 3
Rule 9.40 3

Miscellaneous: Page

H.R. Rep. 1076, 90th Cong., 2d Sess. (1968) 20
Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 Yale L.J. 1177 (1980).. 22
Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1985* (105th ed.) 24
J. Van Dyke, *Jury Selection Procedures* (1977).... 29

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER

v.

COMMONWEALTH OF KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE UNITED STATES

Because Federal Rule of Criminal Procedure 24(b) grants peremptory challenges to both the prosecution and the defense in federal criminal trials,[1] the resolution of the question presented here will affect federal criminal prosecutions. In addition, unlawful racially motivated exclusion of any person from jury service is a criminal offense under the laws of the United States. 18 U.S.C. 243. Accordingly, the United States has an important interest in assuring that a proper accommodation continues to be made between the policies prohibiting un-

---

[1] Ordinarily the prosecution is entitled to 6 peremptory challenges and the defense to 10. If the offenses charged carry a maximum penalty of a fine and/or one year's imprisonment, each side receives only three challenges. In any capital case each side receives 20 peremptories. The district court is also vested with discretion to allow extra peremptories to the defense in a multi-defendant trial and to determine whether defense peremptories should be exercised separately or jointly. Fed. R. Crim. P. 24(b). Rule 24(c) allows limited peremptory challenges to alternate jurors.

lawful racial discrimination and the values advanced by the traditional operation of the peremptory challenge system in the context of the right to a jury trial.

STATEMENT

Following a jury trial in the Circuit Court of Jefferson County, Kentucky, petitioner, a black male, was convicted of second degree burglary, in violation of Ky. Rev. Stat. § 511.030 (1985), and receiving stolen property with a value greater than $100.00, in violation of Ky. Rev. Stat. § 514.110 (1985). Petitioner was sentenced as a persistent felony offender to a term of imprisonment of 20 years. The Supreme Court of Kentucky affirmed. Pet. App. 1-6, 7-9.

1. The evidence at trial is briefly summarized in the opinion of the Supreme Court of Kentucky (Pet. App. 1-2). A victim of the burglary identified petitioner as the intruder she saw in her home taking several purses. A neighbor of the burglary victims also testified that on the day of the burglary she had observed petitioner standing near the home burglarized and later saw him running away from the back of the house. Other evidence showed that petitioner and a co-defendant subsequently pawned two rings belonging to the burglary victims.

2. Under the Kentucky Rules of Criminal Procedure challenges for cause are made, first by the prosecution and then by the defense. After voir dire has been completed, challenges for cause have been exercised, and a sufficient number of prospective jurors have been qualified, each side is given a list of the qualified jurors equal to the number of jurors to be seated plus the total number of peremptory challenges allowed to all parties. Peremptory challenges are then exercised "simultaneously" by each party striking names from the list and returning it to the trial judge. If the offense charged is a felony, the state is entitled to five peremptory challenges and the defendant or defendants jointly are entitled to eight peremptory challenges. If alternative jurors are to be selected, each side is allowed one additional peremptory challenge. If this winnowing process yields sur-

plus jurors the actual jury members are chosen by a random drawing. Ky. R. Crim. P. 9.36, 9.40.

In the instant case, the parties exercised their peremptory challenges and a jury panel was seated.[2] Petitioner thereupon moved to discharge the panel because the prosecutor used four of his six peremptory challenges to strike black prospective jurors, leaving an all white jury panel.[3] Invoking the Sixth and Fourteenth Amendments, petitioner contended that he was denied his right to equal protection of the laws and to "an impartial trial, [by] a cross-section of the community" (Pet. App. 15). The trial court denied the motion on the ground that "[a]nybody can strike anybody they want to" (*id.* at 16), and indicated (*id.* at 17) that the actual composition of the trial jury, as opposed to the venire from which it was drawn, is not subject to scrutiny under the fair cross-section doctrine.

On appeal, petitioner contended that the prosecutor's use of peremptory challenges against blacks had deprived him of an impartial jury and of a trial by persons representing a fair cross section of the community. He conceded that in *Swain* v. *Alabama*, 380 U.S. 202 (1965), this Court had rejected the claim that prosecutorial use of peremptory challenges to strike black prospective jurors in a particular case, by itself, violates equal protection. He argued, however, that this Court had not addressed the continuing vitality of *Swain* following the

---

[2] Following the exercise of peremptory challenges the jury panel and alternate juror selected were called by name by the court and directed to assume their places in the jury box. Pet. App. 14. The jury was then sworn and the court addressed the other prospective jurors as follows (Pet. App. 18):

> Now, all the jurors that have not been selected for one reason or another, I appreciate your being over here. We always have to have a panel large enough to select the twelve or thirteen that try the case.
>
> Thank you very much. You can go back to the Jury Pool and maybe you can pick up another case in there.

[3] It appears (see Pet. App. 14) that all peremptory challenges were exercised.

application of the Sixth Amendment to the states in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), and the Court's ruling, in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), that the Sixth Amendment contemplates a jury drawn from a fair cross-section of the community. In addition, relying on *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), and *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979), petitioner urged the Kentucky court to depart from *Swain* as a matter of state law. In sum, even though he had presented no evidence reflecting a pattern of use of prosecutorial peremptory challenges to strike black prospective jurors, petitioner asserted that the prosecutor's challenge to all of the black prospective jurors in his case created a sufficient indication that the challenges had been exercised solely on the basis of race to require a hearing as to whether the prosecutor had exercised his peremptory challenges for an invalid racially-exclusionary purpose (Pet. App. 10-13).

The Supreme Court of Kentucky affirmed petitioner's conviction, rejecting his jury discrimination claim. The court declined to depart from the *Swain* rule, holding that "an allegation of the lack of a fair cross-section jury which does not concern a systematic exclusion from the jury drum does not rise to constitutional proportions" (Pet. App. 5).

SUMMARY OF ARGUMENT

At issue in this case is the continuing vitality of *Swain* v. *Alabama*, 380 U.S. 202 (1965). *Swain* held that, in light of the historical status of peremptory challenges as an integral part of a criminal jury trial, and the valuable role played by such challenges in guarding against bias among jurors, a prosecutor's use of his peremptory challenges to strike back veniremen in a particular case does not establish a prima facie case of denial of equal protection of the laws to a black defendant. Strong dictum in *Swain*, on the other hand, indi-

cates that peremptory challenges may not be used to deny black citizens the opportunity to participate as equals in the administration of the criminal justice system by prosecutors consistently challenging black veniremen wholly without regard to the particular circumstances of each particular case. This seems to us to draw the line in just the right place, distinguishing in as efficient and administrable a way as possible between permissible peremptory challenges based on the prosecutor's belief—however subjective—that an individual juror will be predisposed against the government's case in a particular criminal trial, and impermissible challenges based on racial prejudice.

Contrary to the view of petitioner, nothing in this Court's decisions recognizing a qualified Sixth Amendment right to a jury *drawn from* a fair cross-section of the community requires reconsideration of *Swain*. First, *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), makes clear that the fair cross-section doctrine applies only to jury venires and lists, and not to actual petit juries chosen from them. But even if the rule were otherwise, the fair cross-section cases would not require revision of the *Swain* rule, because even as applied to jury venires, they prohibit only systematic exclusion as reflected in a consistent pattern of underrepresentation.

Second, the fair cross-section doctrine is but one facet of the historical jury trial right secured by the Sixth Amendment. As the Court made clear in *Williams* v. *Florida*, 399 U.S. 78, 102 (1970), the free availability of peremptory challenges is an integral feature of the criminal jury trial that coexists with the fair cross-section doctrine under the Sixth Amendment. Indeed, the historical and functional justifications for relatively unfettered peremptory challenges rehearsed in *Swain* are precisely the kind of significant state interest that would overcome any fair cross-section doctrine objection, if otherwise applicable. See *Duren* v. *Missouri*, 439 U.S. 357, 367-368 (1979).

Nor does the availability of peremptory challenges render the fair cross-section right applicable to the venire meaningless. A competent prosecutor must husband peremptory challenges to strike those jurors most likely disposed not to give the government's case a fair hearing. A prosecutor who permits himself to act on the basis of racial prejudice is likely to forgo the most effective use of his peremptory challenges, and also runs the risk of creating a record of consistent exclusion of black veniremen that may provoke judicial oversight under *Swain*.

In our judgment, other criticisms of *Swain* that have frequently been voiced are also unpersuasive. *Swain* follows, rather than departs from, established equal protection doctrine in requiring proof of consistent or systematic discrimination as part of a defendant's prima facie case. This is simply a reflection of the elevated standard of proof required when an impermissible racially discriminatory *purpose* is to be inferred from evidence of statistical underrepresentation. We are similarly unpersuaded that *Swain* imposes an unduly difficult burden on defendants seeking to prove systematic exclusion. If the pernicious practice of racially-motivated exclusion in fact prevails in some jurisdictions, public defenders' offices and organizations of defense counsel could relatively easily keep the records necessary to make the required proof. Finally, we cannot agree that *Swain* rests on the objectionable premise that for members of a racial minority, considerations of racial solidarity, rather than of fair consideration of evidence, will determine a verdict. Rather *Swain* simply rests on the assumption that, given the limited information available to litigants upon which to exercise peremptory challenges, the possibility that a prosecutor has been influenced in his challenges by a common group identity of any sort is insufficient to create a prima facie case of unlawful intentional discrimination.

ARGUMENT

PETITIONER DID NOT ESTABLISH THAT HE WAS DEPRIVED OF A PROPERLY CONSTITUTED PETIT JURY OR DENIED EQUAL PROTECTION OF THE LAWS

A. Under *Swain* v. *Alabama* A Defendant Cannot Establish An Equal Protection Violation By Showing Only That Black Veniremen Were Subjected To Peremptory Challenge By The Prosecution In His Case

In *Swain* v. *Alabama*, 380 U.S. at 209-222, this Court held that a prosecutor's striking of all of the black prospective jurors from the petit jury venire in a given case by exercise of peremptory challenges did not deprive the black defendant of the equal protection of the laws. At the same time, the Court strongly suggested that it would be constitutionally impermissible for a prosecutor to employ peremptory challenges systematically and consistently to prevent blacks from serving on petit juries, wholly without regard to circumstances of the particular case, with the result that blacks are denied "the same right and opportunity to participate in the administration of justice enjoyed by the white population" (*id.* at 224). Because the record of the case was considered insufficient to demonstrate that the prosecution had behaved in the fashion that the Court identified as suspect, however, the Court found it unnecessary conclusively to decide whether "a State's systematic striking of Negroes in the selection of petit juries raises a prima facie case under the Fourteenth Amendment" (*ibid.*).

No Member of the Court disagreed with the rule that the striking of black prospective jurors in a particular case cannot alone make out a prima facie violation of the Equal Protection Clause. Justice Goldberg, joined by Chief Justice Warren and Justice Douglas in dissent, differed with the majority only as to whether the record established a prima facie case of systematic exclusion of blacks from jury service that shifted the bu den to the State to establish the legitimacy of its practices. See 380

U.S. at 231-242.[4] Indeed, the dissenting Justices made clear that they did not contemplate that "a prosecutor's motives [be] subject to question or judicial inquiry when he excludes Negroes or any other group from sitting on a jury in a particular case" (*id.* at 245). Rather (*ibid.*),

> [o]nly where systematic exclusion has been shown, would the State be called upon to justify its use of peremptories or to negative the State's involvement in discriminatory jury selection.[5]

The Court's ruling in *Swain* was based on an analysis of the history and function of the peremptory challenge system. The institution was traced to near the inception of the jury trial system in England (380 U.S. at 212-213), and was part of "the settled law of England" at the time of "the separation of the Colonies" (*id.* at 213). The peremptory challenge system was early received into federal and state criminal practice from the common law, and frequently was addressed by statutory enactments.

---

[4] The nub of the disagreement between the Court and the dissent in *Swain* concerned whether a showing that black persons had not served as jurors over a period of time was sufficient to shift the burden of justification to the prosecution, where the defendant had not established that the elimination of black jurors in past cases was attributable to the *prosecution's* strikes. Compare 380 U.S. at 224-228 with *id.* at 237-241 (Goldberg, J., dissenting).

[5] The dissenting Justices' understanding of "systematic exclusion" in this context is reflected in the statement that they would have found a prima facie case of exclusion of black jurors from service based on proof that "Negroes constitute a substantial segment of the population, that Negroes are qualified to serve as jurors, and that none or only a token number has served on juries *over an extended period of time*" (380 U.S. at 244-245 (emphasis added; footnote omitted)).

The dissenting Justices' concurrence in the general rule announced in *Swain* is also reflected in their statement (380 U.S. at 245 (emphasis added)) that

> the State wholly fails to meet the prima facie case of systematic and purposeful racial discrimination by showing that it has been accomplished by the use of a peremptory challenge system unless the State also shows that it is not involved in the misuse of such a system *to prevent all Negroes from ever sitting on a jury.*

Id. at 214-218. The Court observed (*id.* at 219) that "[t]he persistence of peremptories and their extensive use demonstrated the long and widely held belief that peremptory challenge is a necessary part of trial by jury." And the Court characterized the availability of peremptory challenges as " 'one of the most important of the rights secured to the accused' " (*ibid.*, quoting *Pointer* v. *United States*, 151 U.S. 396, 408 (1894)).

The Court explained that the peremptory challenge " 'is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.' " 380 U.S. at 219 (quoting *Lewis* v. *United States*, 146 U.S. 370, 378 (1892)). Allowing the parties, both prosecution and defense, to exercise a challenge to prospective jurors "without a reason stated, without inquiry and without being subject to the court's control" (380 U.S. at 220), serves to "eliminate extremes of partiality on both sides" and to "assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them and not otherwise" (*id.* at 219). The peremptory challenge rests, in part, on the recognition that a safeguard is needed to supplement challenges for cause, which require proof of a degree of partiality of a kind or degree that may not be readily demonstrable. *Id.* at 220. Peremptory challenges may be exercised, inter alia, on the basis of hunches, reactions to a prospective juror's answers and demeanor during voir dire, and other kinds of fleeing insight or speculative inference by counsel. *Ibid.*

The Court also recognized that peremptory challenges are (380 U.S. at 220-222 (footnotes omitted)):

> no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.

The Court explained that given the "limited knowledge counsel has of them," veniremen "are not always judged solely as individuals for the purpose of exercising peremptory challenges," but may be challenged for reasons "which may include their group affiliation, in the context of the case to be tried." *Id.* at 221. Thus, "[i]n the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause," just as are "accountants or those with blue eyes" (*id.* at 212, 221).[6]

The Court concluded (*id.* at 222):

> In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it.[7]

---

[6] Only by means of individual questioning, resulting in much more protracted voir dire proceedings than are now commonplace, could the litigants base peremptory challenges on criteria other than a person's appearance and group characteristics (including such non-racial group characteristics as age, sex, occupation, education background, etc.).

[7] The Court elaborated (380 U.S. at 222):

> The challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards. The prosecutor's judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity. And a great many uses of the challenge would be banned.

In Part III of the Court's opinion the Court turned to *Swain*'s assertion that "there ha[d] never been a Negro on a petit jury in either a civil or criminal case in Talladega County and that in criminal cases prosecutors have consistently and systematically exercised their strikes to prevent any and all Negroes on petit jury venires from serving on the petit jury itself" (380 U.S. at 223). As indicated above, the Court ultimately concluded that the record did not sufficiently support this claim to require its definitive resolution. But the Court tentatively suggested an important distinction raised by the broad claim advanced in *Swain*. On the one hand, the Court had in *Swain* decided "that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged" (*ibid.*). On the other hand, the equal protection claim was seen to take on "added significance" when "the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be" removes black jurors by peremptory challenge, "with the result that no Negroes ever serve on petit juries." *Ibid.* The Court added (*id.* at 224 (emphasis added)):

> If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. *Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population.* These ends the peremptory challenge is not designed to facilitate or justify.

In the present case, petitioner's challenge was based entirely on the prosecution's exercise of its peremptory challenges in the particular case. See pages 3-4, *supra*.

There is no suggestion in the record that the prosecution generally struck black prospective jurors in criminal trials when the defendant was black, much less that the prosecutor habitually struck black jurors regardless of the circumstances of the particular case, so as to deny black citizens the opportunity to participate as jurors in the operation of the criminal justice system. Accordingly, *Swain* is controlling here unless it is to be overruled. Because the basis most commonly cited for doing just that (see, *e.g.*, Pet. 4-5) lies in this Court's Sixth Amendment jurisprudence developed subsequently to *Swain*, we turn to those cases before addressing directly the arguments made for abandoning *Swain*.

B. A Prosecutor's Consideration Of The Group Identity Of Veniremen In Exercising Peremptory Challenges, In The Manner Permitted By *Swain*, Does Not Violate The Sixth Amendment Fair Cross-Section Principle Recognized By This Court

1. The Sixth Amendment provides in pertinent part that in federal criminal prosecutions "the accused shall enjoy the right to a speedy and public trial *by an impartial jury*" (emphasis added). In *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), this Court held that the Sixth Amendment right to trial by jury is made applicable to state criminal trials by the Fourteenth Amendment. Then, in *Taylor* v. *Louisiana*, 419 U.S. 522, 526 (1975), the Court made explicit what was implicit in prior decisions: that "the presence of a fair cross-section of the community on venires, panels, or lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions". In reaching this result, the Court considered prior decisions under the Sixth and Fourteenth Amendments and the Court's supervisory power, the language and legislative history of the federal Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* (419 U.S. at 526-530), and the function served by the institution of trial by jury: "to guard against the exercise of arbitrary power—to make available the com-

monsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over conditioned or biased response of a judge" (*id.* at 530). And the Court concluded that "[t]his prophylatic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool" (*ibid.*).

At the same time, the Court in *Taylor* made clear the limits of its holding, deliberately preserving the outlines of preexisting doctrines allowing substantial latitude in jury selection procedures. The Court emphasized that the "fair-cross-section principle must have much leeway in application" (419 U.S. at 538), and explicitly reaffirmed (*ibid.*):

> [W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, *Fay* v. *New York*, 322 U.S. 261, 284 (1947); *Apodaca* v. *Oregon*, 406 U.S. [404,] 413 [(1972)] (plurality opinion); but the jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

In *Taylor*, the Court held that a state law excluding any woman from consideration for jury service unless she had filed a written statement volunteering for such service that had resulted in gross underrepresentation of women in the jury service wheel was inconsistent with the Sixth Amendment. Subsequently, in *Duren* v. *Missouri*, 439 U.S. 357 (1979), the Court held that a state law that provided an automatic exemption to women seeking to be excused from jury service, which had produced similar underrepresentation in jury venires, was similarly invalid. In *Duren*, the Court summarized the elements of a criminal defendant's prima facie showing of a violation of the fair cross-section requirement. A defendant must show (439 U.S. at 364):

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

Even when a defendant makes out the required showing of "systematic disproportion" (439 U.S. at 368 n.26), the State remains free to adduce "adequate justification for this infringement" (*ibid.*) by demonstrating that "a significant state interest" is served by "those aspects of the jury-selection process * * * that result in the disproportionate exclusion of a distinctive group" (*id.* at 367-368 (footnote omitted)).

2. The courts of appeals have generally concluded that *Taylor* and the fair cross-section requirement do not impair the authority of *Swain*, and that, even under a Sixth Amendment theory, a defendant complaining of prosecutorial use of peremptory challenges must establish that strikes in his particular case are part of a pattern of systematic exclusion. At least five circuits have explicitly rejected Sixth Amendment claims.[8] State courts generally have taken a similar view of the bearing

---

[8] See *Grigsby* v. *Mabry*, 758 F.2d 226, 230 (8th Cir. 1985) (en banc); *United States ex rel. Palmer* v. *DeRobertis*, 738 F.2d 168, 172 (7th Cir. 1984); *United States* v. *Clark*, 737 F.2d 679, 681-682 (7th Cir. 1984); *United States* v. *Thompson*, 730 F.2d 82, 85 (8th Cir. 1984), cert. denied, No. 83-6809 (Nov. 13, 1984); *Willis* v. *Zant*, 720 F.2d 1212, 1219 n.14 (11th Cir. 1983), cert. denied, No. 83-1558 (June 18, 1984); *United States* v. *Whitfield*, 715 F.2d 145, 146-147 (4th Cir. 1983); *United States* v. *Childress*, 715 F.2d 1313, 1321 (8th Cir. 1983) (en banc), cert. denied, No. 83-5659 (Jan. 9, 1984); *Weathersby* v. *Morris*, 708 F.2d 1493, 1497 (9th Cir. 1983), cert. denied, 464 U.S. 1046 (1984). In at least two other circuits, the continuing vitality of *Swain* has recently been reaffirmed without explicit reference to the fair cross-section doctrine. See *United States* v. *Canel*, 708 F.2d 894, 898 (3d Cir.), cert. denied, 464 U.S. 852 (1983); *United States* v. *Jenkins*, 701 F.2d 850, 859-860 (10th Cir. 1983).

of the Sixth Amendment fair cross-section principle on claims of discriminatory use of peremptory challenges.[9]

However, beginning with *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), a case where the state exercised more than 20 peremptory challenges, and *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979), a case where the state exercised 48 peremptory challenges, some state courts, *acting on the basis of state law*, have held that the use of peremptory challenges to remove prospective jurors possessing particular group characteristics in a single case may violate a defendant's right to a jury drawn from a representative cross section of the community. See also *State* v. *Crespin*, 94 N.M. 486, 489, 612 P.2d 716, 718 (Ct. App. 1980); *State* v. *Neil*, 457 So. 2d 481 (Fla. 1984); *State* v. *Gilmore*, 199 N.J. Super. 389, 489 A.2d 1175 (1985).

More recently, in *McCray* v. *Abrams*, 750 F.2d 1113 (1984), petition for cert. pending, No. 84-1426, a divided panel of the Second Circuit held that the Sixth Amendment authorizes a defendant to challenge prosecutorial peremptory challenges whenever, in a given case, the defendant can show that there is a "substantial likelihood that the challenges leading to [exclusion of venire members of a given cognizable group in the community] have been made on the basis of the individual venire persons' group affiliation" (750 F.2d at 1131-1132). And in *United States* v. *Leslie*, 759 F.2d 366, 374 (1985), a divided panel of the Fifth Circuit held that, in federal criminal prosecutions, "[i]f the defendant timely objects, the district court must exercise its supervisory authority

---

[9] See, *e.g.*, *People* v. *Williams*, 97 Ill. 2d 252, 454 N.E.2d 220 (1983), cert. denied, No. 83-5785 (May 14, 1984); *People* v. *McCray*, 57 N.Y.2d 542, 443 N.E.2d 915 (1982), cert. denied, 461 U.S. 960 (1983); *Belino* v. *State*, 465 So. 2d 1043 (Miss. 1985); *State* v. *Wiley*, 698 P.2d 1244 (Ariz. 1985); *Nevius* v. *State*, 699 P.2d 1053 (Nev. 1985); *Commonwealth* v. *Henderson*, 497 Pa. 23 (1981), 438 A.2d 951; *State* v. *Grady*, 93 Wis. 2d 1, 286 N.W.2d 607 (1979).

to determine whether the prosecutor has considered the veniremen's race in employing his peremptory challenges, and if so whether his consideration of race in that case was justifiable." (The Fifth Circuit subsequently decided, sua sponte, to reconsider *Leslie* en banc.)

These recent cases represent a significant departure from *Swain*. For instance, under *Wheeler*, a defendant makes out a prima facie case by showing that most or all of the black members of a venire in the given case have been challenged by the prosecution. See also *McCray*, 750 F.2d at 1131-1132, 1133. The burden then shifts to the prosecution to justify its use of peremptory challenges on specific grounds relevant to the case being tried. The grounds offered need not, however, rise to the level that would justify a challenge for cause. *Wheeler*, 22 Cal. 3d at 281-283, 583 P.2d at 764-766, 148 Cal. Rptr. at 906-907; *McCray*, 750 F.2d at 1132. The required justification has been elaborated in *People* v. *Hall*, 35 Cal. 3d 161, 167-168, 672 P.2d 854, 858, 197 Cal. Rptr. 71, 75 (1983) (citation omitted; emphasis in original):

> [O]nce a prima facie case of group bias appears the allegedly offending party [is] required to come forward with explanation to the court that demonstrates other bases for the challenges, *and* the court [must] satisfy itself that the explanation is genuine. This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily, for "we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination."

See also *McCray*, 750 F.2d at 1132. Those state courts that have departed from *Swain*, moreover, have generally ruled that defense peremptory challenges are subject to

the same restrictions and judicial scrutiny on the same terms as those exercised by the prosecution.[10]

3. Contrary to the reasoning of the Second Circuit panel in *McCray*, this Court's Sixth Amendment decisions do not require and do not support abandonment of the limitations recognized in *Swain* upon defense objections to prosecutorial peremptory challenges.

a. We note, at the outset, that the "extension" of the fair cross-section principle to authorize judicial oversight of peremptory challenges is directly contrary to the admonition of this Court in *Taylor* (419 U.S. at 538) emphatically disavowing any "requirement that petit juries actually chosen • • • mirror the community" or "reflect the various distinctive groups in the population." The Court took pains to make clear that it is only "the jury wheels, pools of names, panels, or venires from which juries are drawn" that "must not systematically exclude distinctive groups in the community." *Ibid.* And the Court reaffirmed this limitation in *Duren* v. *Missouri*, 439 U.S. at 363-364 & n.20. Thus the fair cross-section doctrine developed by this Court in interpreting the Sixth Amendment provides no reason for reconsidering *Swain* v. *Alabama*, and would seem to have no application at all to peremptory challenges.

In any event, even as applied to the selection of jury venires and lists, the focus of Sixth Amendment fair cross-section jurisprudence has always been on *systematic* and recurring exclusion of the allegedly disfavored group over time in the jury selection process. See, *e.g.*, *Taylor*, 419 U.S. at 531, 538. Thus, in formulating the elements

---

[10] See *Wheeler*, 22 Cal. 3d at 282 n.29, 583 P.2d at 785 n.29, 148 Cal. Rptr. at 906-907 n.29; *Commonwealth* v. *Reid*, 424 N.E.2d 495, 498-501 (Mass. 1981); *Neil*, 457 So. 2d at 487. In *Reid*, for example, the court determined that the defendant, a woman charged with murdering a man, had improperly exercised her peremptory challenges to exclude men from the petit jury and held that it was proper to disallow the challenges. In California, at least, this rule has generally resulted in more extensive voir dire examination. See *People* v. *Williams*, 29 Cal. 3d 392, 401-407, 628 P.2d 869, 872-877, 174 Cal. Rptr. 317, 320-325 (1981).

of a defendant's prima facie case in *Duren*, the Court included both the showing that "representation of this group in the venires from which juries were selected is not fair and reasonable in relation to the number of such persons in the community," and the showing that "this underrepresentation is due to systematic exclusion of the group in the jury selection process" (439 U.S. at 364). And the application of this test to the facts of *Duren* underscores the historical perspective it imports. The Court ascertained both the existence of underrepresentation (*id.* at 364-366) and the systematic nature of exclusion (*id.* at 366-367) by examining composition over an extended period of time, remarking (*id.* at 366 (emphasis added)) that Duren's "demonstration that a large discrepancy occurred not just occasionally, but *in every weekly venire for a period of nearly a year* manifestly indicates that the cause of the underrepresentation was systematic." Thus the fair cross-section doctrine provides no basis for relieving a defendant of the burden of showing consistent and systematic exclusion of black prospective jurors, if he wishes to establish impermissible use of prosecution peremptories.

b. Moreover, the argument that *Taylor* and *Duren* require abandonment of *Swain* pulls the fair cross-section doctrine loose from its moorings in the Sixth Amendment and ignores both the evolution of the cross-section doctrine and the rationale of *Swain* itself. The Sixth Amendment does not, on its face, establish any fair cross-section requirement. What it guarantees, instead, is an "*impartial* jury of the State and district wherein the crime shall have been committed" (emphasis added). To be sure, in *Taylor* the Court confirmed language in prior cases indicating that "'[t]rial by jury presupposes a jury drawn from a pool broadly representative of the community'" (419 U.S. at 530, quoting *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)). But, as we have shown, *Taylor* carefully distinguishes the inclusionary process of forming the jury pool from what is by nature an exclusionary

process of eliminating particular persons from service on a particular jury through the challenge system. 419 U.S. at 538.

Indeed, the importance of this distinction is confirmed by this Court's decisions in *Williams* v. *Florida*, 399 U.S. 78 (1970), and *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), upholding, respectively, the authority of states to employ six-person juries and to accept nonunanimous verdicts. Each of these cases articulates the fair cross-section principle as a component of the Sixth Amendment right to jury trial. *Apodaca*, 406 U.S. at 410 (opinion of White, J.); *Williams*, 399 U.S. at 100. Yet, each case records the Court's understanding that it is the traditionally unfettered exercise of the peremptory challenge that properly limits the scope of the fair cross-section doctrine, rather than the reverse. Thus, in *Williams*, Justice White explained for the Court (399 U.S. at 102 (emphasis added)):

> Even the 12-man jury cannot insure representation of every distinct voice in the community, *particularly given the use of the peremptory challenge.* As long as arbitrary exclusions of a particular class from the jury rolls are forbidden, see, *e.g.*, *Carter* v. *Jury Commission*, 396 U.S. 320, 329-330 (1970), the concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one.

Similarly, in rejecting the fair cross-section objection to nonunanimous verdicts in state cases, Justice White reiterated that "[a]ll that the Constitution forbids * * * is *systematic* exclusion * * *" (*Apodaca*, 406 U.S. at 413 (plurality opinion) (emphasis added)).

c. The fair cross-section doctrine is thus but an interpolation of the Sixth Amendment right to trial by jury. It helps to clarify important aspects of that right, but does not define every facet thereof. Indeed, this conclusion is underscored by *Duren* itself, which cautions that, even with respect to the constitution of jury venires (the precise subject of the fair cross-section doctrine), the elements of the defendant's prima facie case do not

exhaust the required inquiry. Rather, demonstration of a "significant state interest" that is "manifestly and primarily advanced" by selection criteria or procedures responsible for "disproportionate exclusion" is sufficient to sustain such arrangements. *Duren*, 439 U.S. at 367-368. Accordingly, the fair cross-section standard is far from absolute or exclusive even within its proper domain. In this context, the historical and functional justifications for the relatively unfettered exercise of peremptory challenges that were found sufficient in *Swain* to "provide[] justification for striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes" (380 U.S. at 212), are equally sufficient to surmount challenge under the Sixth Amendment. Indeed, in light of the "very old credentials" possessed by the peremptory challenge (*ibid.*), the Sixth Amendment, which necessarily incorporates in substantial respects historical jury practices, is a far weaker basis upon which to challenge alleged abuse of the peremptory challenge system, than the Fourteenth Amendment doctrine of equal protection, the primary focus of consideration in *Swain*, which obviously was intended to overturn some aspects of prevailing state law.[11]

---

[11] In reconciling the traditional peremptory challenge system with the requirements of the Sixth Amendment it is instructive to consider the accommodation made by Congress in the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* The statute explicitly states the policy of the United States that every litigant entitled to trial by jury is entitled to a petit jury "selected at random from a fair cross section of the community in the district or division wherein the court convenes." 28 U.S.C. 1861. At the same time, the House Report makes clear that there was no intention to disturb *Swain* v. *Alabama* as it bears upon federal jury selection (H.R. Rep. 1076, 90th Cong., 2d Sess. 5-6 (1968).

> It should be noted, however, that the bill does not change the method of challenging jurors at voir dire. In particular, the bill leaves undisturbed the right of a litigant to exercise his peremptory challenges to eliminate jurors for purely subjective reasons.

While the legislative decision obviously is not controlling with respect to the proper interpretation of the Sixth Amendment, it

We note, as well, that *Swain*, while formally addressed to a claim of denial of equal protection (380 U.S. at 221), will not bear a cramped interpretation that renders it inapplicable to renewal of the same claim under the Sixth Amendment. Little if anything in the Court's analysis of a claim of discrimination founded only upon the exercise of peremptory challenges in a particular case depends on the contours of equal protection analysis or proof. Rather, as we have rehearsed (pages 9-11, *supra*), the Court's analysis rests primarily on the historical status and important contemporary functions of the peremptory challenge system. 380 U.S. at 212-222. And the practical objections to judicial scrutiny of peremptory challenges that the Court found telling (*id.* at 221-222) are equally applicable to a Sixth Amendment claim. The "radical change in the nature and operation of the challenge" (*ibid.*) that the Court foreclosed in *Swain* is no more warranted here.

Indeed, there is no reason to think that *Swain* was decided by a Court oblivious to the fair cross-section aspects of the jury trial right. In *Taylor* the Court emphasized that its decision was almost completely foreshadowed by precedent. See 419 U.S. at 526, 535. In particular citing *Smith* v. *Texas*, 311 U.S. 128 (1940), the Court observed (419 U.S. at 528 (citation omitted)) that

> [t]he unmistakable import of this Court's opinions, at least since 1940 * * * is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.

And one of the key passages from *Smith* (311 U.S. at 130) upon which the Court relied in *Taylor* also formed

---

provides substantial support for the conclusion that the relatively unfettered peremptory challenge system allowed to stand in *Swain* is consistent with the concept of a jury trial under the "American system of justice" (*Taylor*, 419 U.S. at 530). Indeed, *Taylor* itself invokes the language and legislative history of the Act in support of recognition of the fair cross-section doctrine under the Sixth Amendment. See page 12, *supra*.

part of the Court's analytical basis in *Swain*. Compare 419 U.S. at 527 with 380 U.S. at 204.

d. The point of the historical and functional review in *Swain* is that there is a substantial argument from experience that "peremptory challenge is a necessary part of trial by jury" (380 U.S. at 219). And the nub of the Court's functional analysis is that the free and unsupervised availability of peremptory challenges is an excellent method of "eliminat[ing] extremes of partiality on both sides" and "assur[ing] the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them and not otherwise" (*ibid.*). These are objectives that are fundamental to the fulfillment of Sixth Amendment right to trial by "an impartial jury." See, *e.g.*, *Patton* v. *Yount*, No. 83-95 (June 26, 1984), slip op. 11 n.12. Because the impartiality of the jury is explicitly required by the Sixth Amendment, it can scarcely be argued that an historically effective means for attaining that objective should be abandoned in deference to the fair cross-section doctrine that has been developed under the Sixth Amendment as a companion means of contributing to the same objective. There is no reason, based on currently available data, to conclude that case-specific consideration of prospective jurors' group identity characteristics in the exercise of peremptory challenges by both the prosecution and the defense will tend to bias the jury toward either acquittal or conviction. See Note, *Peremptory Challenges and the Meaning of Jury Representation*, 92 Yale L.J. 1177, 1193-1196 (1980). What ultimately matters under the Sixth Amendment is whether the jury that remains after the exercise of all challenges is impartial, not whether some or all of the persons who were eliminated by peremptory challenge would have served impartially. Thus, under a balanced and faithful reading of the Sixth Amendment, the fair cross-section doctrine should not be permitted to override the values served by unconstrained exercise of peremptory challenges, absent demonstration of a pattern of systematic exclusion of the kind condemned in *Swain*'s dictum.

e. It has been suggested, however, that "[t]he right to a jury drawn from a fair cross section of the community is rendered meaningless if the State is permitted to use several peremptory challenges to exclude all Negroes from the jury." *McCray* v. *New York*, 461 U.S. 961, 967 (1983) (Marshall, J., dissenting from the denial of certiorari). We disagree.

As Judge Garwood observed in *United States* v. *Leslie*, 759 F.2d at 393 (dissenting):

> Assuming the prosecution uses its peremptories for the purpose of prevailing in the particular case * * * the jury drawn from a venire representative of all cognizable groups, but from which one group has been eliminated by prosecution group-based peremptory challenges, generally is more likely to be acquittal prone than a jury drawn from an otherwise similar venire that excludes any members of the same group. In the latter instance, unlike the former, the prosecution could eliminate the most acquittal prone [veniremen] by using peremptory challenges it otherwise would have used to eliminate the group in question.

To put the matter another way, if one assumes the competence of the prosecutor and his desire to secure a conviction he believes to be warranted, there is an important automatic safeguard against abuse of peremptory challenges built into the system, at least where, as in Kentucky and in the federal sys em, the number of peremptory challenges available to the prosecution is not unreasonably large. As Judge Meskill explained in *McCray* v. *Abrams*, 750 F.2d at 1138 (dissenting):

> A competent prosecutor will only strike a member of the defendant's group in situations where she believes the possibility of that individual having a group bias—even if very small—is greater than the possibility of some other prospective juror having a bias. Where the group based assumption against members of the defendant's group is outweighed by some other assumption, the prosecutor will turn to the other assumptions; for instance, if a black college student is being tried in a draft registration

case, the prosecutor may prefer to challenge a white social worker than a black veteran.

We add that the competent prosecutor will also have to husband the available peremptory challenges to strike those prospective jurors who, by reason of their answers or demeanor during voir dire, suggest unreceptiveness to the prosecution's case or any idiosyncracy of personality that might "hang" a jury. Conversely, any prosecutor not blinded by racial prejudice will be cognizant that black persons are disproportionately the victims of some types of crimes (see Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1985*, at 169-170) and accordingly that many black jurors, especially women and older persons, may be particularly sensitive to the importance of law enforcement.[12] The upshot is that if a prosecutor is engaged in a truly racially motivated course of striking black veniremen because they are black (and not because of any reason—however subjective—to believe that, as individuals, they are more likely to vote to acquit in a particular case), he disserves the prosecution, as well as the interests of prospective jurors—but probably not the interest of the defendant. Accordingly, there is no reason to think that judicial oversight is needed to deter such unprofessional behavior. In any event, if such behavior is nevertheless part of the regular policy of any prosecuting office, the *Swain* dictum strongly suggests that a remedy will be available.

---

[12] These observations illustrate that race is only one of numerous group characteristics (such as age, sex, family status, occupation, etc.) which in combination may influence a litigant's decision whether to challenge a particular prospective juror, in the context of the characteristics of the other persons under consideration. It is particularly instructive that diversity in non-racial group characteristics has increased substantially among black persons in the United States since *Swain* was decided. For example, the percentage of black adults (25 years or older) with 4 years of high school (or more) education was 31.4 in 1970 and 56.8 in 1983. *Statistical Abstract of the United States 1985, supra*, at 136. See also *id.* at 446 (income statistics).

C. Other Criticisms Of *Swain* Are Unpersuasive

1. Two arguments not resting on the fair cross-section doctrine have also been adduced in favor of abandoning *Swain* v. *Alabama*. First, it is argued that *Swain* unjustifiably requires "several [to] suffer discrimination because of the prosecutor's use of peremptory challenges before any defendant can object" (*McCray* v. *New York*, 461 U.S. at 965 (Marshall, J., dissenting from the denial of certiorari) (footnote omitted)). Second, it is said that "the standard of proof for discrimination in *Swain* imposes a nearly insurmountable burden on defendants" (*ibid.* (footnote omitted)). We do not find these contentions persuasive.

a. *Swain*'s requirement that a defendant demonstrate a pattern of systematic exclusion or discrimination before casting upon the prosecution the burden of justifying its peremptory challenges is not an anomaly in the law. As we have indicated above (pages 18-19), it is consistent with the normal method of proving a prima facie violation of the fair cross-section doctrine. It is equally consistent with the method of proof employed when an equal protection violation is alleged. The elements of a prima facie case of discriminatory purpose are summarized in *Castaneda* v. *Partida*, 430 U.S. 482, 494 (1977) (emphasis added), where the allegation of discrimination concerned selection of grand jurors:

> [I]n order to show that an equal protection violation has occurred * * *, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. *Hernandez* v. *Texas*, 347 U.S., at 478-479. *Next, the degree of underrepresentation must be proved by comparing the proportion of the group in the total population to the proportion called to serve * * *, over a significant period of time. Id.*, at 480. * * *. Finally, * * * a selection procedure that is susceptible of

abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.

Castaneda also explains why it is that this kind of proof, establishing exclusion over a period of time, is required. 430 U.S. at 493. In order to establish a denial of equal protection proof of discriminatory purpose, rather than simply racially disproportionate impact, is required. *Washington* v. *Davis*, 426 U.S. 229 (1976). Absent proof of consistent exclusion or underrepresentation, statistics cannot provide the necessary "clear pattern, unexplainable on grounds other than race, emerg[ing] from the effect of the state action" otherwise "neutral on its face" that is necessary to make out a prima facie case of discriminatory purpose. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Thus, absent direct proof that the prosecution is acting on grounds of racial prejudice rather than exercising his peremptory challenges in a professional manner to strike jurors deemed least likely to be receptive to the government's case, it is entirely proper to require that a defendant challenging prosecution peremptories demonstrate, as part of his prima facie case, a consistent pattern of systematic exclusion.

b. We also find unpersuasive the argument that *Swain* makes it unduly difficult to demonstrate impermissible use of peremptory challenges even when such abusive practices are actually going on. There are cases in which such statistics have been collected and produced, albeit proof of impermissible exclusion generally has not been established.[13] And in appropriate circumstances prosecutorial officials may be called as witnesses on this subject, as the Court indicated in *Swain*. 380 U.S. at 227-228. Moreover, public defender's offices and defense counsel's

---

[13] See, *e.g.*, *United States* v. *Newman*, 549 F.2d 240 (2d Cir. 1977); *United States* v. *Carter*, 528 F.2d 844 (8th Cir. 1975), cert. denied, 425 U.S. 961 (1976); *People* v. *Williams*, 97 Ill. 2d at 271-273, 454 N.E.2d at 229; *People* v. *Payne*, 99 Ill. 2d 135, 457 N.E.2d 1202, 1210-1211, cert. denied, No. 84-5330 (Nov. 13, 1984) (Simon, J., dissenting).

organizations are well situated to collect the requisite statistics. Furthermore, means can readily be devised by which court clerks could assist in preserving the necessary record as to the manner in which peremptory challenges have been exercised. Cf. 28 U.S.C. 1868. Accordingly, there is no sufficient reason to revise the elements of a prima facie case of unlawful purpose discrimination suggested in *Swain*.

2. *Swain* has also been criticized on the ground that its rationale accepts the pernicious notions that "all persons who share an attribute, such as the same skin color, will *ipso facto* view matters in the same way, and that minority groups are less able than whites to decide the case solely on the basis of the evidence" (*McCray* v. *Abrams*, 750 F.2d at 1131; see also *id.* at 1121). If *Swain* actually depended on such notions we assuredly would not advocate its continuing vitality. But we cannot agree that *Swain* accepts either of these offensive notions.

First, *Swain* does not asume that individual juror's verdicts are determined by their race or other facet of their group identity. Instead, the Court simply recognized that peremptory challenges are necessarily exercised upon very limited information and that, given the available data, it is not necessarily irrational nor reflective of racial prejudice to consider the possibility that a juror from a given distinctive group in the population may be at least marginally more likely to be disposed toward—or against—favorable consideration of a given defendant. Recognition of this possibility is not inconsistent with this Court's decisions, and indeed may be required to protect a defendant's rights. See *Ham* v. *South Carolina*, 409 U.S. 524 (1973); *Aldridge* v. *United States*, 283 U.S. 308 (1931); see also *Rosales-Lopez* v. *United States*, 451 U.S. 182, 192 (1981) (opinion of White, J.).

Moreover, when persons of all societal groups are seen to be included in the jury pool, the elimination of particular black prospective jurors in a particular case through the exercise of peremptory challenges lacks the

stigmatizing effects, implying that group's unfitness to serve or inferior status, that are one of the evils of de jure or even de facto exclusion of minority jurors from service. See *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1879). Stigmatizing effects are avoided in this context both because members of *every* distinctive group are both in theory and in practice subject to peremptory exclusion because of perceived affinity with a defendant and because the prosecutorial challenge takes place in an adversary context where it is balanced by the defendant's challenges to other prospective jurors. Thus, realistically speaking, the prosecutor's challenges in a particular case do not stand even as an implied official pronouncement respecting the relative capabilities or rights of various groups in society.[14] In addition, where, as in Kentucky and

[14] See *United States* v. *Leslie*, 759 F.2d at 392 (Garwood, J., dissenting) (emphasis in original):

> Thus, excluding a particular cognizable group from all venire pools is stigmatizing and discriminatory in several ~~a~~related ways that the peremptory challenge is not. The former singles out the excluded group, while individuals of all groups are equally subject to peremptory challenge on any basis, including their group affiliation. Further, venire-pool exclusion bespeaks *a priori* across-the-board total unfitness, while peremptory-strike exclusion merely suggests potential partiality in a particular isolated case. Exclusion from venires focuses on the inherent attributes of the excluded group and infers its *inferiority*, but the peremptory does not. To suggest that a particular race is unfit to judge in any case necessarily is *racially insulting*. To suggest that each race may have its special concerns, or even may tend to favor its own, is not. For instance, it says nothing adverse, or even truly racial, about blacks to infer that they may be more likely to have greater antipathy to the Ku Klux Klan than whites. Finally, the role played by the decision maker is significant. If the neutral structurer of the system excludes a cognizable group, the exclusion necessarily represents the official judgment of *society* that the group is generally inferior. Under the adversary framework of a trial, however, *society* is neutral; neither side is favored, neither speaks for society, each speaks only for itself. To be peremptorily challenged by one side or the other hence bespeaks a judgment which is neither societal nor even normative, but merely reflects the tactical determina-

in some federal courts, peremptory challenges are exercised simultaneously in a nonverbal fashion, the jury chosen cannot even be certain as to which party struck which veniremen.[15]

3. It is appropriate, finally, to consider the practical difficulties that would attend modification of the rule of *Swain*.

First, there would be the serious question whether defense peremptories should be comparably restricted. As the Court emphasized in *Swain* itself (380 U.S. at 219), the peremptory challenge is " 'one of the most important rights secured to the accused' " (quoting *Pointer* v. *United States*, 151 U.S. at 408). Indeed, one of the important uses of defense peremptory challenges in many cases where the defendant is black is to eliminate white jurors who are believed to harbor subtle, unacknowledged, or even unconscious bias against blacks. It is widely believed by defense counsel that challenges for cause are an insufficient protection for this purpose. J. Van Dyke, *Jury Selection Procedures* 168 (1977). Yet, a rule grossly differentiating between prosecutorial and defense use of peremptories would distort the present role of the peremptory challenge system in effectuating the constitutional requirement of jury impartiality.

The additional judicial supervision of peremptory challenges sought by petitioner would also impose unwarranted burdens on the courts. As Judge Meskill observed, dissenting in *McCray*, 750 F.2d at 1139, the logic of the Sixth Amendment analysis could be carried very far indeed: "[M]en, women, old people, young people, laborers, professionals, Democrats, Republicans, etc." may all be put forward as distinctive groups presumptively im-

---

tion of one contesting litigant's counsel that the challenged person is, under the discrete facts of that particular case, more likely to favor the other side, which in the ultimate judgment of society may or may not prove to be the side of virtue and right.

[15] In the present case, the judge's exemplary courtesy in excusing the remaining members of the pool after the jury was sworn (see note 2, *supra*) further minimized any possibility of stigma.

munized from routine peremptory challenge. We need not forecast a *reductio ad absurdum* to emphasize the dramatic change such a regime would effect in the traditional peremptory challenge system.

There would also predictably be undesirable second order consequences as well. Pressure would increase for more elaborate voir dire to enable counsel to flesh out their hunches that presently underlie unexplained peremptory challenges. See page 17 note 10, *supra*. And the trial courts would be faced with the "extremely difficult task of assessing the internal motives of attorneys" (*King* v. *Nassau County*, 581 F. Supp. 493, 501-502 (E.D.N.Y. 1984)). We do not rely on the unfortunate reality that counsel would face incentives to be less than candid with the inquiring court—although that possibility must be recognized. Rather, even if counsel are scrupulous and make every effort to be candid in responding to this unfamiliar form of inquiry, it may often be difficult for counsel accurately to explain the precise motivation behind challenges to particular persons. See *Swain*, 380 U.S. at 220. Given the weakness of the affirmative argument for abandoning or revising the *Swain* rule, there is simply no sufficient reason for this Court to require state and federal courts and litigants before them to undertake the radical change proposed by petitioner.

CONCLUSION

The judgment of the Supreme Court of Kentucky should be affirmed.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

SIDNEY M. GLAZER
Attorney

AUGUST 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10276